AGE DISCRIMINATION IN EMPLOYEE BENEFIT PLANS: THE IMPACT OF THE BETTS DECISION

JOINT HEARING

BEFORE THE

SELECT COMMITTEE ON AGING

AND THE

SUBCOMMITTEES ON EMPLOYMENT OPPORTUNITIES

AND

LABOR-MANAGEMENT RELATIONS

OF THE

COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

SEPTEMBER 21, 1989

Aging Comm. Pub. No. 101-744
Education and Labor Comm. ~~Pub.~~ Serial No. 101-60

Printed for the use of the Select Committee on Aging and the Committee on Education and Labor

U.S. GOVERNMENT PRINTING OFFICE
25-286 ⇆ WASHINGTON : 1990

For sale by the Superintendent of Documents, Congressional Sales Office
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H341-16
H141-7

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CONTENTS

MEMBERS OPENING STATEMENTS

Page

Chairman Edward R. Roybal 1
Chairman Matthew G. Martinez 5
William L. Clay 6
Augustus F. Hawkins 10
Matthew J. Rinaldo 11
Mary Rose Oakar 15
Louise M. Slaughter 17
James H. Bilbray 19
Jerry F. Costello 21
Constance A. Morella 22

CHRONOLOGICAL LIST OF WITNESSES

Carolyn Betts 23
Robert Laufman, Attorney at Law, Laufman, Rauh and Gerhardstein, Cincinnati, Ohio 34
R. Gaull Silberman, Vice Chairman, United States Equal Employment Opportunity Commission 50
Charles A. Shanor, General Counsel, United States Equal Employment Opportunity Commission 59
Karen Clauss, Professor of Law, University of Wisconsin 80
Mark S. Dichter, Attorney at Law, Morgan, Lewis & Bockius, Philadelphia, PA 84
Christopher Mackaronis, Attorney at Law, Bell, Boyd & Lloyd 126
Scott J. Macey, Vice President and Secretary, The ERISA Industry Committee; and Executive Vice President and General Counsel, AT&T Actuarial Sciences Associates, Inc. 169
Ellen Fredel, Attorney at Law, Shaw, Pittman, Potts & Trowbridge, Washington, DC 182
Fred Rumak, Director of Tax and Legal Services, Buck Consultants, Inc 189
Burton D. Fretz, Executive Director, National Senior Citizens Law Center, Washington, DC 200

APPENDIX

Additional material received for the record:
  Written responses by R. Gaull Silberman, Vice Chairman, and Charles A. Shanor, General Counsel, U.S. Equal Employment Opportunity Commission, to written followup questions submitted by Chairman Roybal, Chairman Clay and Chairman Martinez 215
  Written responses by Charles A. Shanor, General Counsel, U.S. Equal Employment Opportunity Commission, to written followup questions submitted by Representative Marge Roukema on behalf of Representative Harris W. Fawell 222
  Kevin McCarthy, Second Vice President, LTD Products/Markets, UNUM Corporation, Portland, Maine, letter 234
  Horace B. Deets, Chairman, Leadership Council of Aging Organizations, Washington, DC, letter and attachments 238
  Lou Glasse, President, Older Women's League, Washington, DC, letter 246
  Horace B. Deets, American Association of Retired Persons, letter 247

Page

Written responses by Robert F. Laufman, Attorney at Law, Laufman, Rauh & Gerhardstein, Cincinnati, Ohio, to written questions submitted by Representative Marge Roukema 248

Robert F. Laufman, Attorney at Law, Laufman, Rauh, & Gerhardstein, Cincinnati Ohio, supplementary statement 256

Kenneth Henley, General Counsel, International Brotherhood of Du Pont Workers, Martinsville, VA, letter 266

Dick Warden, Legislative Director, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Washington, DC, letter 268

Roy B. Howard, Vice President-Industrial Relations and Benefits, BellSouth, Corporation, Atlanta, Georgia, letter 270

Peter A. Hernandez, Vice President, Employee Relations, American Iron and Steel Institute, Washington, DC, letter and prepared statement 275

Douglas S. McDowell, General Counsel, Equal Employment Advisory Council, Washington, DC, letter and attachment 292

Thomas J. Conboy, Chairman, Justice for Age Discrimination in Employment, Inc., Annapolis, Md., prepared statement 297

AGE DISCRIMINATION IN EMPLOYEE BENEFIT PLANS: THE IMPACT OF THE BETTS DECISION

THURSDAY, SEPTEMBER 21, 1989

U.S. HOUSE OF REPRESENTATIVES, SELECT COMMITTEE ON AGING, AND THE COMMITTEE ON EDUCATION AND LABOR, SUBCOMMITTEES ON EMPLOYMENT OPPORTUNITIES AND LABOR-MANAGEMENT RELATIONS,
Washington, DC.

The committee and subcommittees met, pursuant to notice, at 9:35 a.m., in Room 2175, Rayburn House Office Building, Hon. Edward R. Roybal (chairman of the Select Committee on Aging) and Hon. Matthew G. Martinez (chairman of the Subcommittee on Employment Opportunities) presiding.

Members present:

Select Committee on Aging: Roybal, Ford, Hughes, Hertel, Sisisky, Slaughter, Jontz, Pallone, Unsoeld, Schneider, Bentley, Schuette, Morella, and Stearns.

Education and Labor Subcommittee on Employment Opportunities: Martinez, Gunderson, and Smith.

Education and Labor Subcommittee on Labor-Management Relations: Kildee, Hayes, Owens, Sawyer, Ballenger, Petri, and Grandy.

Education and Labor—Full Committee: Bartlett.

Staff Present:

Select Committee on Aging: Manuel R. Miranda, Staff Director; Paul Ceja, General Counsel; Valeria Batza, Executive Assistant; and Diana Jones, Staff Assistant.

Education and Labor Committee, Subcommittee on Employment Opportunities: Eric Jensen, Staff Director; Tammy Harris, Legislative Assistant; and R. Terry Deshler, Staff Assistant.

Education and Labor Committee, Subcommittee on Labor-Management Relations: Fred Feinstein, Staff Director; Phyllis Borzi, Pension Counsel; and Carl Anderson, Staff Attorney.

OPENING STATEMENT OF CHAIRMAN EDWARD R. ROYBAL

Mr. ROYBAL. The committee and subcommittees will come to order. Today's joint hearing between the Select Committee on Aging and the Education and Labor Subcommittees on Employment Opportunities and Labor-Management Relations, is to review an issue critical to the employment concerns of America's elderly: Whether this Nation's fundamental employment rights law protecting older workers, the Age Discrimination in Employment Act, permits employers to arbitrarily discriminate against older workers in employee benefit plans such as health, life and disability insurance benefits. That is the principal thrust of this hearing. I firmly believe that we must look into this matter, and make appropriate recommendations.

As you know, the Committee on Aging is not a legislative committee, but a fact-finding committee. However, in joining with the Committee on Education and Labor we will be able to make proper recommendations for the legislative changes needed with regard to age discrimination in employment.

Our first panel this morning will be composed of Ms. Carolyn Betts, Mr. Robert Laufman, Ms. Silberman and Mr. Charles Shanor.

Now, before we hear from the witnesses, the Chair will recognize the chair of the subcommittee, Mr. Martinez.

[The prepared statement of Chairman Roybal follows:]

OPENING STATEMENT
CHAIRMAN EDWARD R. ROYBAL

AGE DISCRIMINATION IN EMPLOYEE BENEFIT PLANS: THE IMPACT OF THE BETTS DECISION

Good Morning. Today's hearing is to review an issue critical to the employment concerns of America's elderly: Whether this nation's fundamental employment rights law protecting older workers -- the Age Discrimination in Employment Act -- permits employers to arbitrarily discriminate against their older workers in employee benefit plans such as health, life and disability insurance benefits.

For the past twenty years, the Age Discrimination in Employment Act has been interpreted -- by the federal agencies responsible for enforcing the law -- as prohibiting employers from arbitrarily discriminating against older workers in all critical areas of the employment relationship, including employee benefit plans.

On June 23rd, however, the United States Supreme Court, in the Betts case, determined that Congress did not intend the A-D-E-A to be fully applicable to employee benefit plans. Justice Thurgood Marshall, in his dissent, stated that the Betts decision immunizes virtually all employee benefit plans from liability under the A-D-E-A, and gives employers a free hand to fashion discriminatory benefit programs.

It is my belief that we in Congress intended the Age Discrimination in Employment Act to prohibit arbitrary age discrimination not only in such areas as hiring, firing, wages and promotions, but also in the important area of employee benefit plans. It is inconcievable to me that Congress intended the A-D-E-A to allow what happened to June Betts, the 61 year-old plaintiff in the Betts case.

Congress would not have sanctioned such blatant discrimination as an employer's denial of essential disability retirement benefits to an individual with severe medical problems, simply because that individual was too old.

On August 4, 1989, I introduced the Older Workers Benefit Protection Act, H.R. 3200. This bill will restore what had been the accepted interpretation of the A-D-E-A with regard to employee benefits for the twenty years prior to the Betts decision. It does this by essentially putting into law the federal agency regulations on the A-D-E-A in effect before the Betts decision.

The purpose of this hearing is to provide an opportunity for a full airing of the views on this issue, and we will hear from some witnesses with differing opinions. However, I believe that now is the time for Congress to re-state what we intended when we passed the landmark A-D-E-A in 1967 -- that arbitrary discrimination against older workers on the basis of age is unlawful in all critical areas of the employment relationship, including employee benefits.

OPENING STATEMENT OF CHAIRMAN MATTHEW G. MARTINEZ

Mr. **Martinez**. Thank you, Mr. Roybal, Mr. Chairman.

As Mr. Roybal has said, the Select Committee on Aging is not a legislative committee. The Subcommittee on Employment Opportunities, which has jurisdiction here, is. And one of the things we will be hearing today is testimony on H.R. 3200, which is Mr. Roybal's bill, which we are very much in support of.

H.R. 3200 is a bill that simply tries to make the law what it was before the Betts decision, not anything more than that. There has been some in the community, the business community especially, who, are fearful of what this bill might do. And another thing is that many responsible people in the business community understand that older workers, people who have lived a lifetime of contributing their worth to the work force have a reason to believe that they should live their twilight years in relative security, free from harassment or from being taken advantage of.

I think those that are responsible in the business community understand that what is fair is fair and that these people should be protected as they were before Betts.

There has been misrepresentations about the congressional intent regarding this law. And we hope that we can, with some of the testimony we receive today and some of the statements that we make later on, clarify that.

The Supreme Court decision is just that: A Supreme Court decision. In our government, we are fortunate that we have three divisions of our government, which is Legislative, Judicial and Executive. The Supreme Court may even be out of sync with the thinking of the administration. The court is certainly out of sync with the majority of the Congress in doing what they did, which, in my belief, flies in the face of a well-established body of laws and regulations that have been in place for 10 to 20 years.

It is unthinkable to me that many in the business community, most of whom had no problems comporting themselves to the discrimination regulations of the EEOC, would suddenly choose to argue in favor of discrimination against older workers, and argue in favor of the Supreme Court decision.

Now, I look forward to the witnesses today, Mr. Chairman, and hopefully some of what is still a mystery to some will be cleared up, and hopefully we will get the kind of information, as you said, that we need to proceed on with your bill, H.R. 3200.

Thank you, Mr. Chairman.

Mr. **Roybal**. Thank you, Mr. Martinez. Mr. Clay, Chairman of the Subcommittee on Labor-Management Relations will not be able to attend today's hearing due to a conflicting hearing. However, he has asked me to submit his opening statement for the hearing record, and I do so at this time.

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SUBCOMMITTEE ON
LABOR-MANAGEMENT RELATIONS

Opening Statement

William L. Clay
Chairman, Subcommittee on Labor-Management Relations

at a joint hearing of the Subcommittees on Labor-Management Relations and Employment Opportunities of the Committee on Education and Labor and the Select Committee on Aging

on

Age Discrimination in Employee Benefit Plans: the Impact of the *Betts* decision

September 21, 1989

Today the Subcommittee on Labor-Management Relations joins with the Subcommittee on Employment Opportunities and the Select Committee on Aging to consider an issue of vital interest to all older workers in America: the impact of the Supreme Court's recent decision in *Public Employees Retirement System of Ohio v. Betts* on their employee benefit plans.

I was pleased to be an original sponsor of H.R. 3200, the Older Workers Benefit Protection Act. This bill reaffirms the original intent of Congress when it passed the Age Discrimination in Employment Act of 1967 (ADEA): to preclude employers from discriminating against older workers with respect to employee benefits. It also reaffirms the limited exception to that broad principle: if an age-based differential in benefits under a bona fide employee benefit plan is justified by significant cost considerations, observance of the terms of that plan may protect the employer from what would otherwise be a violation of ADEA.

The Supreme Court's recent decision in the *Betts* case upset nearly 20 years of settled interpretation of ADEA by the courts and two federal agencies and gave employers broad authority to structure employee benefit plans in ways that clearly discriminate against older workers.

Justice Anthony Kennedy, writing for the majority of the Court, turned aside the plain language of the statute and the ample legislative history on this issue to hold that the only way that an employer could violate section 4(f)(2) of ADEA (the exemption for bona fide employee benefit plans that are not a subterfuge to evade the purposes of the law) was if the employer also discriminated in some other non-fringe benefit aspect of the employment relationship.

In addition, the Court reversed the decisions of every appellate court that had ruled on the issue by requiring employees to bear the burden of proving that the employee benefit plan was a subterfuge to evade the Act. Prior to Betts, under both court and federal agency precedents, the employer had the burden of proving that its plan was not a subterfuge.

Finally, the Court shielded plans that were established prior to the enactment of ADEA (except for subsequent substantive amendments to those plans) from the reach of ADEA. In other words, unlike the legal treatment given to infractions of civil rights laws generally, the Court would permit employers that established discriminatory plans prior to ADEA's enactment in 1967 to continue to discriminate in ways that would clearly violate ADEA were the plan to be adopted today.

As Justice Thurgood Marshall points out in his dissent:

> The majority today immunizes virtually all employee benefit programs from liability under the Age Discrimination in Employment Act of 1967. ... Henceforth, liability will not attach under the ADEA even if an employer is unable to put forth any justification for denying older workers the benefits younger ones receive, and indeed, even if his only reason for discriminating against older workers in benefits is his abject hostility to, or his unfounded stereotypes of them. In reaching this surprising result, the majority casts aside the estimable wisdom of all five Courts of Appeals to consider the ADEA's applicablility to benefit programs, of the two federal agencies which have administered the Act, and of the Solicitor General as amicus curiae, all of whom have concluded that it contravenes the text and history of the Act to immunize discrimination against older workers in benefit plans which is not justified by any business purpose. ...

The Court's outrageous departure from well-settled law under ADEA cannot stand. H.R. 3200, the Older Workers Benefit Protection Act, restores the law to what it was before the Court's decision in Betts. It reaffirms Congress' original intent in enacting the Age Discrimination in Employment Act and clarifies and codifies the traditional interpretation of the statute by the executive branch agencies responsible for administering the Act from its inception.

Today we will hear from a series of witnesses representing the EEOC, the business community, the aging community, the private bar, and Mrs. Betts' own daughter and attorney. I have been most disturbed by the strident hyperbole of some in the business community as to the effect of our legislation. A handful of people have deliberately tried to cloud the issue by injecting into the discussion irrelevant issues at the same time that they raise as open issues some issues that most reasonable people agree are well-settled and unaffected by this bill. For instance, this bill does not reopen pension issues affecting defined benefit plans that were settled in 1986 with the adoption of a new section 4(i) of the Age Discrimination in Employment Act.

Some opponents of this legislation would have you believe that the longstanding requirement that differentials in benefits between older workers and younger workers must be justified by actuarial cost considerations (the so-called equal cost or equal benefit rule) is some new or not widely recognized rule. Nothing could be farther from the truth.

Some opponents of this legislation want us to ignore the 10 year old rule that if the employer wants to demonstrate on a benefit package basis that differentials in benefits between older and younger workers are justified under the equal cost standard, pension benefits may not be considered as part of the package. Thus those that have argued that H.R. 3200 will preclude severance pay packages in which those workers eligible for retirement get nothing and younger workers get cash are right. But that is old news. For 10 years that has been true. On the other hand, severance package could be and usually are structured in full compliance with the EEOC regulations so that older workers are offered some additional pension benefit (for instance, eligibility at an earlier age for retirement) that is actuarially equivalent to the cash that younger workers are offered.

I hope that this hearing will help us to crystallize our thinking on these issues and enable us to sort through the arguments. To the extent that legitimate questions are raised, I hope that our witnesses will work with us to fashion reasonable solutions in a timely fashion. It is clear from the testimony we will hear from the EEOC today, however, that we must move swiftly to correct the tremendous injustice done to the millions of older workers in this country by the Supreme Court. The imminent dismissal of many otherwise meritorious cases in the aftermath of the Court's unfortunate and unjustified Betts decision is most troubling.

In Betts, the Court gave employers an unsolicited gift they never imagined possible even in their wildest dreams: virtual immunity for their employee benefit plans from ADEA violations. Congress must rescind this gift before employers' dreams become older workers' nightmares.

Mr. ROYBAL. At this time, if there are no objections, I will submit the prepared statements of several of our colleagues for the hearing record. Hearing no objections, so ordered.

[The prepared statements of Representatives Hawkins, Rinaldo, Oakar, Slaughter, Bilbray, Costello, and Morella follow:]

Education and Labor Committee
Augustus F. Hawkins (D-CA), Chairman
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STATEMENT OF AUGUSTUS F. HAWKINS, CHAIRMAN, COMMITTEE ON EDUCATION AND LABOR, HEARING ON "AGE DISCRIMINATION IN EMPLOYEE BENEFIT PLANS: THE IMPACT OF THE BETTS DECISION"

SEPTEMBER 21, 1989

I wish to express my appreciation to the Chairmen of the House Aging Committee and the Subcommittees on Employment Opportunities and Labor-Management Relations for convening this important hearing regarding the impact of Public Employees Retirement System v. Betts on employee benefit plans. As you know, we have witnessed a series of damaging decisions this year by the Supreme Court in the area of equal employment opportunity. Collectively, these decisions have turned back the clock on civil rights and have forced the Congress and the American people to open old wounds and to revisit issues that should have been long resolved. Therefore, instead of moving forward and developing a legislative agenda for the Year 2000, we must spend precious time preserving the status quo before these unfortunate decisions were handed down.

Betts is a decision which was wrongly decided. Surely the Congress did not intend to permit the Age Discrimination in Employment Act (ADEA) to allow for a broad exemption in the area of employee benefit plans or to limit the scope of the ADEA to hiring, wages, terminations and promotions. Moreover, Congress could not have intended to exempt all employee benefit plans established prior to the enactment of the ADEA in 1967. Lastly, the Congress could not have intended for a woman such as Mrs. June Betts, suffering from the effects of a debilitating disease, to be denied more favorable disability benefits simply because she was 61 years old instead of 60, the maximum age for the receipt of such benefits.

With this hearing, we begin the arduous process of overturning decisions which our learned members of the Supreme Court have improperly decided, to the detriment of our senior citizens and other protected groups. I congratulate the Chairmen of these committees for convening this important hearing.

CONGRESSMAN MATTHEW J. RINALDO OPENING STATEMENT FOR AGING COMM. JOINT HEARING ON BETT'S CASE

MR. CHAIRMAN:

I WANT TO COMMEND YOU FOR HOLDING THIS HEARING TODAY JOINTLY WITH THE HOUSE EDUCATION AND LABOR SUBCOMMITTEES CHAIRED BY MY COLLEAGUES CONGRESSMAN MARTINEZ AND CONGRESSMAN CLAY.

I THINK ALL OF US HERE WOULD AGREE THAT THE SUPREME COURT BETT'S DECISION HAS STIRRED STRONG REACTIONS IN CONGRESS AND AMONG OLDER WORKERS. IT IS ENTIRELY APPROPRIATE THAT WE MOVE QUICKLY TO REVIEW THE IMPACT OF THE SUPREME COURT BETT'S CASE AND FOCUS CONGRESSIONAL ATTENTION ON AGE DISCRIMINATION AS IT PERTAINS TO EMPLOYEE BENEFIT PLANS.

AT THE OUTSET, I WANT TO UNDERSCORE MY STRONG OPPOSITION TO AGE DISCRIMINATION. CONGRESS HAS GONE ON RECORD TIME AND TIME AGAIN AND EVEN STRENGTHENED THE ADEA OVER THE YEARS TO PREVENT SUCH DISCRIMINATION. I THINK MOST OF US AGREE THAT IT HAS ABSOLUTELY NO PLACE IN THE EMPLOYER-EMPLOYEE RELATIONSHIP.

IN THE WAKE OF THE BETT'S CASE, DISAGREEMENT HAS ERUPTED OVER THE ISSUE OF AGE DISCRIMINATION IN EMPLOYEE BENEFIT PLANS. WHEN CONGRESS PASSED THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 (ADEA), IT PROHIBITED AN EMPLOYER FROM DISCRIMINATING AGAINST AN EMPLOYEE IN THE "COMPENSATION, TERMS, CONDITIONS, OR PRIVILEGES OF EMPLOYMENT, BECAUSE OF SUCH INDIVIDUAL'S AGE." WE CRAFTED CERTAIN LIMITED EXCEPTIONS TO THIS PROHIBITION, AND I THINK THE BURDEN OF PROOF TO LIFT THOSE EXCEPTIONS LIES WITH THOSE WHO WISH TO DISCRIMINATE AGAINST OLDER WORKERS.

IN THE BETT'S DECISION, THE SUPREME COURT SAID THAT CONGRESS HAD ORIGINALLY GRANTED A BROAD EXEMPTION FROM AGE DISCRIMINATION LIABILITY TO EMPLOYERS IN THE CONDUCT OF THEIR EMPLOYEE BENEFIT PLANS. THE COURT RULED THAT UNDER ADEA, BENEFIT PLANS THAT DIFFERENTIATE ON THE BASIS OF AGE ARE NOT DISCRIMINATORY UNLESS THE EMPLOYEE SHOWS THE PLAN WAS DEVELOPED TO ADVANCE AGE DISCRIMINATION IN THE NON-FRINGE ASPECTS OF THE EMPLOYEE RELATION -- FOR EXAMPLE, WAGES, HIRING, FIRING, AND PROMOTION.

FRANKLY, I DISAGREE WITH THE COURT'S DECISION. I DON'T THINK CONGRESS INTENDED TO BE AS NARROW IN ITS PROTECTIONS AS THE COURT CONTENDS, AND I THINK WE OUGHT TO SET THE RECORD STRAIGHT.

I AM AWARE, HOWEVER, THAT A NUMBER OF EMPLOYER GROUPS HAVE EXPRESSED STRONG OPPOSITION TO THE BILL WE ARE CONSIDERING TODAY, H.R. 3200. THEY HAVE SAID THAT, IF IT IS PASSED, IT WILL HURT ALL WORKERS, PARTICULARLY THOSE IT IS MOST INTENDED TO HELP.

I WANT TO HEAR THEIR VIEWS, AND I WANT TO EVALUATE THEM CAREFULLY. BUT IF THE GOAL IS MERELY TO ALLOW DISCRIMINATION ON THE BASIS OF AGE, I FRANKLY WILL NOT BE TOO SYMPATHETIC. THE ORIGINAL EEOC REGULATIONS TOOK INTO ACCOUNT THE BUSINESS PURPOSE OF SUCH EMPLOYER DECISIONS AND THE COST TO EMPLOYERS OF PROVIDING EQUAL BENEFITS TO OLDER WORKERS. I HOPE THE INDUSTRY REPRESENTATIVES HERE TODAY CAN SPEAK TO THE QUESTION OF WHY THOSE REGULATIONS WERE SO ONEROUS AND WHY WE SHOULDN'T RESTORE THEM.

Mr. Chairman, age discrimination is wrong and I hope the hearing today will underscore that bipartisan view. Most importantly, I want to encourage our witnesses and the groups they represent to come forward with a sense of compromise. If individuals do not support H.R. 3200, I hope they are willing to offer their own alternatives or suggested improvements that can make the legislation better.

Again, I commend the chairs for convening this joint hearing, and I yield back the balance of my time.

Statement of Representative Mary Rose Oakar
Before a Joint Hearing of the
House Select Committee on Aging and the
Education and Labor Subcommittees on
Labor-Management Relations and Employment Opportunities

September 21, 1989

I WOULD LIKE TO THANK CHAIRMAN ROYBAL FOR HOLDING THIS HEARING TODAY, AS WELL AS CHAIRMAN CLAY AND CHAIRMAN MARTINEZ FOR THEIR CONCERN AND COOPERATION IN THIS MOST IMPORTANT HEARING ON THE IMPACT OF BETTS V. OHIO ON THE AGE DISCRIMINATION IN EMPLOYMENT ACT. I ALSO COMMEND THEIR STAFF FOR THEIR EXCELLENT PREPARATION FOR THIS HEARING, AND FOR ASSEMBLING THE DISTINGUISHED PANEL BEFORE US TODAY. I LOOK FORWARD TO HEARING THE TESTIMONY OF EVERYONE CONCERNED AND I HOPE WE CAN SHED SOME LIGHT ON JUST WHAT MEASURES THE CONGRESS MAY TAKE TO ENSURE THE CONTINUED PROTECTION OF OLDER AMERICANS ACCESS TO EMPLOYMENT BENEFITS.

I COMMEND CHAIRMAN ROYBAL'S EFFORTS TO REVERSE THE EFFECT OF THE BETTS DECISION. I FIND IT DIFFICULT TO BELIEVE THAT THE AGE DISCRIMINATION IN EMPLOYMENT ACT CAN NOT PROTECT A OLDER AMERICAN'S RIGHT TO RETIREMENT BASED ON DISABILITY. I AM ALSO VERY CONCERNED AT THE IMPACT THAT THIS DECISION HAS ON OLDER AMERICAN'S ABILITY TO REMAIN IN THE WORK FORCE. WE CANNOT DISCOURAGE OUR OLDER CITIZENS FROM CONTINUING TO LEAD ACTIVE LIVES. WE CANNOT AFFORD TO LOSE THE VALUABLE YEARS OF EXPERIENCE THAT OLDER AMERICANS HAVE TO OFFER, BECAUSE OF AGE DISCRIMINATION IN BENEFITS PROGRAMS. OLDER AMERICANS ARE THE FASTEST GROWING GROUP IN OUR NATION. BY THE YEAR 2040 THEIR NUMBERS WILL DOUBLE FROM THE CURRENT 12 PER CENT OF OUR NATION'S POPULATION TO 22 PER

CENT. IT IS IMPORTANT THAT WE DO NOT CUT THESE AMERICANS OUT OF THE WORK FORCE BEFORE THEY ARE READY TO RETIRE. IT IS IN THE BEST INTERESTS OF OLDER AMERICANS TO REMAIN ACTIVE IN THEIR CAREERS AS LONG AS THEY WISH TO, AND IT REMAINS IN THE BEST INTERESTS OF OUR NATION TO FACILITATE THEIR DESIRE TO DO SO.

THANK YOU AGAIN DISTINGUISHED CHAIRMEN AND MEMBERS OF THE EDUCATION AND LABOR COMMITTEE AND SELECT COMMITTEE ON AGING, FOR HOLDING THIS HEARING TODAY, FOR ALLOWING ME TO SUBMIT MY STATEMENT, AND GIVING EVERYONE HERE TODAY THE OPPORTUNITY TO INVESTIGATE THE IMPLICATIONS OF THE BETTS CASE.

Opening Statement of Congresswoman Louise M. Slaughter

before the joint hearing of the
House Select Committee on Aging
and the Education and Labor Subcommittees on
Employment Opportunities and Labor Management

Thursday, September 21, 1989

Mr. Chairman, like my colleagues who share an active interest in the needs and concerns of older Americans, I am deeply troubled by the implications of the recent Supreme Court decision in the Betts case. In his dissent, Justice Marshall asserted that the majority interpretation of the Age Discrimination in Employment Act of 1967 (ADEA) would give employers a "free hand to fashion discriminatory benefit programs" and effectively "immunize acts of unabashed discrimination against older workers" from liability.

Mr. Chairman, the Supreme Court's decision in this case causes me serious concern which reaches to the ultimate ability of older American citizens to protect themselves and to be protected by the federal government from illegal age discrimination. I am anxious to learn more from our panel of expert witnesses about the likely implications of the Betts decision on the enforcement of ADEA in other areas of job discrimination against older workers.

Mr. Chairman, I understand that legislation has been introduced in both houses which would counter the Court's interpretation of ADEA by giving more explicit definition to Section 4 (f)(2) of that Act. Some in the business community have expressed to me their opposition to this corrective legislation and I am hopeful that the testimony presented here today will lend clarity to all sides of the issue.

In closing, Mr. Chairman, thank you for calling this hearing today. Discrimination against the elderly is as vile and hateful as that which is directed against race, creed, and sex. I am always grateful to have the opportunity to address ways in which we can ensure non-discrimination, and I am hopeful that a careful examination of the testimony presented here today might illuminate those first steps toward accomplishing just that.

OPENING STATEMENT OF THE HONORABLE JAMES H. BILBRAY AT THE HOUSE SELECT COMMITTEE ON AGING HEARING ON "AGE DISCRIMINATION IN EMPLOYEE BENEFIT PLANS: THE IMPACT OF THE BETTS DECISION", SEPTEMBER 21, 1989

Mr. Chairman, just a few short weeks ago, the Supreme Court dealt a stunning blow to the rights of America's senior citizens when it rendered its decision in the case of Public Employees Retirement System of Ohio v. Betts. This decision, which was handed down on June 23, makes it virtually impossible for older workers to prove that they have been discriminated against by employers in an employee benefits package, and severely hampers the effective enforcement of the Age Discrimination in Employment Act of 1967 (ADEA), the centerpiece of our nation's laws that protect our older workers from unjust discrimination merely on account of their age.

When the Court rendered this decision, it disrupted what I think all will agree was a settled area of law. For the past twenty years, both the Equal Employment Opportunity Commission (EEOC) and the Department of Labor, which orginally had responsibility for enforcing the ADEA, have consistently interpreted the ADEA to require that an employer may not provide older workers with a reduced benefits package, except where the employer can give a significant cost based justification for doing so. This EEOC interpretation was used by the Nixon, Ford, Carter and Reagan Administrations, and five of the U.S. Circuit Court of Appeals had affirmed its validity. In addition, the Reagan Administration filed a friend of the court brief in the Betts case, arguing in favor of the EEOC's regulations. Clearly, these regulations strike a good balance between protecting the rights of older workers and giving employers the flexibility they require to design benefits packages that are well tailored to meet the needs of their workers.

However, the Court chose to do away with all of this positive experience of the past twenty years, and instead substitute an interpretation of ADEA that practically makes it impossible for an older worker to sue an employer on account of a discriminatory benefits package. Indeed, Justice Thurgood Marshall summarized the effect of the decision very well when he wrote in his dissent, "The majority today immunizes virtually all employee benefits programs from liability under the Age Discrimination in Employment Act of 1967...Henceforth, liability will not attach under the ADEA even if an employer is unable to put forth any justification for denying older workers the benefits younger ones receive, and indeed, even if his only reason for discriminating against older workers in benefits is his abject hostility to, or his unfounded stereotypes of them".

Mr. Chairman, I am proud to join with you in co-sponsoring legislation that will correct the Supreme Court's erroneous interpretation of the ADEA. Basically, this legislation will put into law the EEOC's longstanding regulations governing age discrimination in employee benefits, and we will make this area of law settled once again. We owe our older workers the protection that this legislation will give them against arbitrary discrimination in the benefits that they are offered by employers.

Currently, there are many cases pending in the courts that allege discrimination in benefits, which the EEOC estimates are potentially worth more that $1 billion to our older workers. Mr. Chairman, these older Americans clearly have very much to lose if we do not act quickly to remedy this, and I urge the swift enactment of this much needed legislation.

OPENING STATEMENT

BY U.S. REP. JERRY COSTELLO, ILLINOIS

SEPTEMBER 21, 1989

SELECT COMMITTEE ON AGING

"AGE DISCRIMINATION IN EMPLOYEE BENEFIT PLANS"

Mr. Chairman, today we will hear from several witnesses concerned about the effectiveness of employee benefit plans, particularly how they affect older Americans.

As we have seen in recent years regarding the Supreme Court's ruling in the Public Employees Retirement System of Ohio v. Betts, employers have a degree of flexibility when it comes to extending certain benefits to older employees in terms of their age.

This hearing will review the issue of age discrimination in employee benefit plans in light of the recent Supreme Court ruling, and review whether the Age Discrimination in Employment ACt prohibits employers from arbitrarily discriminating against older workers in their health insurance, life insurance, disability insurance and other employee benefit plans.

It is certainly of concern to older Americans in my district that they be treated with the same benefits as other employees, so they so deserve those benefits. I look forward to today's hearing.

HON. CONSTANCE MORELLA
OPENING STATEMENT
SEPTEMBER 21, 1989

Constance Morella

MR. CHAIRMAN, THANK YOU FOR SCHEDULING THIS JOINT HEARING TO REVIEW AGE DISCRIMINATION IN EMPLOYEE BENEFIT PLANS.

IN VIEW OF THE RECENT SUPREME COURT DECISION IN PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO V. BETTS, IT IS IMPORTANT FOR OUR COMMITTEES TO REVIEW THE IMPACT OF THIS DECISION ON OLDER AMERICANS. IT IS CLEAR THAT A NUMBER OF IMPORTANT ISSUES INVOLVING THE ADEA HAVE BEEN DELINEATED BY THE COURT, AND WE IN CONGRESS HAVE A RESPONSIBILITY TO DETERMINE WHETHER CONGRESSIONAL INTENT HAS BEEN CORRECTLY INTERPRETED. I HAVE HEARD FROM A NUMBER OF ORGANIZATIONS WHICH BOTH SUPPORT AND OPPOSE THE SUPREME COURT DECISION, AND I LOOK FORWARD TO HEARING THE TESTIMONY OF OUR WITNESSES TODAY.

Mr. ROYBAL. Now ladies and gentlemen, I think, just as a matter of background, it is necessary to review what the Supreme Court has done, in the issue before us today.

On June 23, the United States Supreme Court in the Betts case, determined that Congress did not intend the ADEA to be fully applicable to employee benefit plans. Justice Marshall, in his dissent, stated that the Betts decision immunizes virtually all employee benefit plans from liability under the ADEA, and gives employers a free hand to fashion discriminatory benefit programs.

Now, the question is, was this intended by the Congress? Well, it is my belief that we in Congress intended the Age Discrimination in Employment Act to prohibit age discrimination, not only in such areas as hiring, firing, wages and promotions, but also in the important area of employee benefit plans. It is inconceivable to me that Congress intended the ADEA to allow what happened to June Betts, the 61-year-old plaintiff in the Betts case.

Congress would not have sanctioned such blatant discrimination as an employer's denial of essential disability retirement benefits to an individual with severe medical problems, simply because that individual was too old; 61 years old in this particular instance.

Now, the purpose of this hearing, again, is to provide an opportunity for a full airing of the views on this issue, and we will hear, first of all, from Carolyn Betts, and then hear from every witness at the table.

Ms. Betts, will you please proceed?

STATEMENT OF CAROLYN BETTS

Ms. BETTS. Thank you very much, Mr. Chairman. I am here to represent my mother who is now in a nursing home. She will be 66 in 9 days. She is in the third of four stages of Alzheimer's Disease. The fourth stage is death, so it really is not a stage.

My mother was the most healthy person that I ever knew. She, to my knowledge, never took a sick day other than to take care of sick children when she worked. And we thought she would live to be very old. She came from a very healthy family, and she was just never sick. So this was a great shock to us when she was unable to continue working.

The symptoms of her illness started appearing when she was 59, but she stayed on to work as long as she could. The symptoms were such that no one really knew she was sick. So she was demoted in a number of jobs.

She started out as a speech pathologist for the Hamilton County Board of Mental Retardation. She had gone back to school when she was 52, something like that, to get a Master's Degree in speech pathology. She went to work for Hamilton County Board of Mental Retardation when she graduated.

When she started losing her capacity to work, she was demoted a couple of times. Her first job after that was working on the line, an assembly line for a group. I forget what they call it, but when mentally retarded adults work on an assembly line. Eventually she became what is tantamount to a babysitter before she left.

I want to give you a little bit of background on my mother just to let you know something about her. She grew up in the depression.

Her father died the year the stock market crashed and all their money was in a bank in North Carolina. He had tuberculosis. And so she grew up in fairly dire circumstances. Somehow her mother sent her and her sister to Smith College. But back then a woman who went to Smith College did not aspire to a great career. She aspired to marry a man from Yale or Harvard, which is what my mother did. She worked for Dr. Sabin, who developed the Sabin vaccine, polio vaccine, in Cincinnati, at Children's Hospital. Then when my father went to seminary in Cambridge, Massachusetts, she worked for Harvard Medical School through two pregnancies, when my brother and I were born.

From when I was about three until I was in high school, she stayed home and cared for us. She went back to work doing a lot of things that—she was a very articulate woman. She tended to speak in the pluperfect and subjunctive a lot. She sort of spoke the King's English and was very heady, I guess. But she never really worked in jobs that were what I would have aspired to from that background, although she was an English teacher for a few years.

She also worked at the University of Cincinnati as a secretary, stenographer, in the German and Geology Departments. This was to pay our tuition so that we would not have to go to the public school. We had moved to Cincinnati from a small town, and the public school was pretty rough. We were pretty scared of going there. She worked so that we could live in relative comfort, and did not particularly like her jobs, but she did not really think about that a whole lot, because she really thought of a job as something to help her family out and support us. The rules used to be that this was her place and that she would be cared for through her husband's support, his good job, and retirement. But somewhere along the line the rules changed, and she got caught up in that.

She decided to go back to school after, I think, I said, "Mom, you have got to have something of your own now". And so she went back and she took anatomy and statistics and all sorts of things that were sort of incredible for one's mother to take. After she went to work, she started losing her ability to function. She used to have to do what's called IEPs. I do not know what "IEP" stands for, but it's what you have to write up by law if you work with disabled people to show what kind of progress they make. It involves collating numbers and, you know, not terribly difficult tasks. But somehow the disease affected her ability to do that. We thought it was sort of a psychological problem that she had, because my father was talking about moving from the house we lived in for many years, from the rectory, and perhaps leaving his job, and she was pretty insecure about that. So we kept trying to help her get along.

My father decided to leave at that point somewhere along the line, and she was starting to have problems. The problems got worse. She would do things like forget dates and get confused. She would get lost on the way back from the supermarket. So we tried to make up for the things that she was lacking, and tried to build her confidence. We did not know how bad it was until they demoted her a couple of times, and we had to keep moving her to cheaper apartments, smaller and cheaper apartments, because she did not have enough money. And eventually her employer told her not to come back. But she did not even tell us this. She was in such shock that she did not have a job that she went back to her job. Her employer called my sister at work and said, you have to come get your mother. She cannot work here any longer.

She was very ashamed and she did not know what was wrong. She kept saying, I have done something wrong and I do not know what it is, and I am so sorry. But she just could not function. And so we put her in a nursing home. We had to pay quite a lot of money, like a lump sum to get them to take her. The problem was that she was very young, and she was very able-bodied, and she could walk around and get into a lot of trouble as far as they were concerned, and she could live a very long time. They did not want to take in somebody who could live a very long time under their care. She did not have that much money. But, unfortunately, the first nursing home did not work. They kicked her out. At that point she was so horrified where she was and so afraid that the doctors put her in the psych ward at Christ Hospital in a strait jacket. I went to visit her there. It was pretty heart-rending.

We could not find a nursing home at that point. We did not know what to do, so she went to live with my sister's in-laws and my sister while my brother-in-law was in graduate school. She was lucky to have a family of people around there who were just willing to sort of look after her. There were people in and out of the house cooking meals and she just sort of tagged along. But my sister moved to Illinois after that, and we had to find a nursing home who would take her. So she is now in the Arbors in Terrace Park, Ohio.

Somewhere along the way, when we were told that she did not qualify for disability, when she had to leave her job, she was told she either had to take a leave without any pay, a sick leave, and be able to come back if she got better, or she could take early retirement at $158 a month, and she would not be able to come back. We were concerned because we did not have a lot of money. If she was not able to come back to work, we did not know what she would be able to do, and we just did not understand why she did not qualify for disability.

So my stepmother, who happens to be a case worker at EEOC, told us that she did not think this was legal, and she referred us to our lawyer who advised us what to do. So we filed suit, and somehow we ended up at the Supreme Court. We won all the way up to the Supreme Court. And then on June 23rd the decision came down that we had lost.

The reason that I have gone into detail about this story is that I think there are a lot of women who are in this situation where they get to be middle-aged and their children grow up and they have no careers. They go back to work to sort of start from scratch at 53, 55, whatever. If they become disabled at that point, they are not vested sometimes in their retirement programs. If they are not eligible for disability, they do not have anything.

The thing that seems insane to me is that people who oppose the public sector taking care of social benefit programs in this instance are seeing to it that my mother goes on Medicaid. That is what is going to happen. Her money will hold out for maybe a little bit, some part of this year. Then she will be completely destitute. We hope the nursing home will allow her to stay where she is. But Medicaid will be paying all of her expenses. They will collect money from my father in alimony. They will take her Social Security, and we will not have any say over anything having to do with my mother at that point.

The effect of this decision is that she goes on Medicaid earlier, and you and I have to pay for that in our tax dollars, and she is not entitled to the same benefits that a 25-year-old person would be entitled to if he or she became disabled. A 25-year-old who was disabled, who worked for Hamilton County Board of Mental Retardation, would have had disability for the rest of his or her life. My mother is not entitled to that. So I urge you to support the bill, and to support all the people who are in this type of situation.

Thank you very much.

[The prepared statement of Ms. Betts follows:]

TESTIMONY OF CAROLYN BETTS
BEFORE THE SELECT COMMITTEE ON AGING
OF THE U.S. HOUSE OF REPRESENTATIVES
September 21, 1989

I am here today because my mother cannot talk to you herself. Today, my mother is in a nursing home outside of Cincinnati and has Alzheimer's Disease or a related disorder, although her former employer, in denying her disability benefits available to younger workers, takes the position she is not "disabled."

My mother was the healthiest person I have ever known. We thought she would live to be at least 90 and know her great grandchildren. Her two greatest fears in life were these: (1) that she would become financially destitute, unable to support herself and (2) that she would die a long agonizing death and be a burden on her family. Her greatest fears are being realized as she dies inch by inch on the road to financial ruin. On September 30, she will turn 66. She is in the third of four stages of Alzheimer's Disease. The fourth stage is death. The symptoms started to appear by the time she was 59.

My mother was a child of the Depression whose father died when she was 7: the year the stock market crashed. Somehow, her mother found a way to send her and her sister to Smith College. It did not occur to my mother that she could have had a career, even though she was an imposing and articulate woman, gifted with words in a way few people are, and had a fine classical education. She worked in a series of jobs not suited for her talents in order to support herself and her family. After graduating from Smith, she was a medical secretary for Dr. Albert Sabin -- the developer of the Sabin polio vaccine. She was a secretary at Harvard Medical School through two pregnancies while her husband was in Episcopal Theological Seminary. She served sincerely and conscienciously without pay for almost 30 years as a minister's wife. She went back to work as an English teacher to earn money for me to go to private school in the 9th grade because my public school was not very safe and I was afraid. Then she was a stenographer in the German and Geology Departments of the University of Cincinnati. She worked in jobs for which she was overqualified, doing things she was not gifted at, reporting to people who were less intelligent then she, so that her children could go to good schools. It did not occur to her that she had any choice. And the party line was that this was her role as a woman, and she would be taken care of in her old age if she played by the rules.

When she was in her 50's the rules changed. Her children grew up and left home and her husband wanted to lead a different kind of life. I talked to her about the importance of having a fulfilling life outside of her family and she must have taken that to heart, because she decided at 52 to return to school to get a Master's in Speech Pathology at University of Cincinnati. She worried about flunking anatomy and statistics, but actually did well and made lots of friends. I never told her, but now I realize what a tremendous accomplishment it was for a fifty year old to change her role in life.

After being awarded her Master's Degree in 1978 at age 55, Mother went to work as speech pathologist for the Hamilton County Board of Mental Retardation. Her job was fulfilling and involved tremendous amounts of patience because mentally retarded clients don't make dramatic progress on a day to day basis. She was enthusiastic about it and would tell stories about children with cerebral palsy and brain damage. She drew pictures of dogs, cars, horses and the like to elicit responses from the children and teach them to speak so that their families and others could understand them. She recognized their struggles. At some point she started losing her ability to function effectively in everyday life. She forgot dates, suffered great anxiety and did strange things like getting lost, forgetting appointments and leaving the gas stove burners on. Then she started having a very difficult time filling out "IEPs", the progress reports required to be submitted for each disabled child in public schools or programs. We thought she was just under stress because my father was talking about changing jobs, which would have meant leaving the house she had lived in for 20 years. The doctors gave her valuim and thyroid pills. Psychiatrists at $100 an hour told us she did not have Alzheimer's Disease. In 1982 my father left his job and left my mother.

We moved her to a comfortable apartment and then, when she was demoted in her job because of her illness, we moved her to a cheaper, smaller place next door to me. Instead of working as a speech pathologist, she was on an assembly line in sheltered workshops helping mentally retarded people do piece work. She desperately wanted to keep her job and felt like a failure because she was not able to do it well. She was at that time 60. She became unable to care for her beloved dog Georgie and started eating frozen dinners without thawing them. She would go to the supermarket and get lost on the way home. We would get calls from the police when they would find her. At some point during this process, she was told by her employer that she had to leave. She was so afraid of what would happen if she didn't have a job to support herself that she went back to her job even after they told her not to come back. Her supervisor called my sister Amy and told her to come pick Mother up because she could no longer work there. Mother was terrified of not having enough money to live on and was hysterical when she tried to understand and to explain to us what had happened. She thought she had done something wrong and was ashamed of losing her job.

We spoke with Mother's supervisor to find out what to do. He said she could take permanent early retirement at $158/month or she would have to take on unpaid leave with nothing. He said that Mother couldn't go on disability because she was over 60. My sister vividly recalls saying "you mean she can't qualify for disability because she is over 60?" She was 61. When she retired, Mother was making about $12,000/year as a glorified babysitter — significantly less than her salary as a speech pathologist when she started. The retirement income was figured as a percentage of her average salary over 5 years, so she got less retirement because she was working while she was partially disabled! If she had qualified for disability retirement, she would have been entitled to $350 per month. Had Mother been able to take disability earlier when the symptoms started to prevent her from practicing her profession, she would have been better off. She was penalized for trying to work and to overcome her terrifying illness.

My stepmother, an EEOC case worker, told us denying Mother disability on the basis of age was not legal. If we didn't just happen to know someone who was an expert in the subject, we never would have known. We got an attorney to advise us what to do. We were particularly concerned because we thought at the time that Mother might be able to return to work, but if she retired, she would not ever be able to go back to work. Her small income from early retirement, a small amount of alimony and a small income from a few private investments was not nearly enough to cover her living expenses and medical bills.

We filed suit and won our case in District Court. PERS appealed. We won again in the Circuit Court of Appeals. PERS petitioned the U.S. Supreme Court to hear the case. During this time Mother went into the first nursing home. Because it was so expensive to pay for typesetting all the briefs for the Supreme Court, we filed a motion for hearing in forma pauperis so the court would pay the printing costs and filing fees. It was humiliating to call Mother a pauper and put her at the mercy of the court, but Mother's money was needed to pay nursing home bills and the amount of money we could win in the case was not much more than the court costs.

Mother was initially put in the only nice senior citizens, independent care facility we could cajole into taking her. We had to pay $20,000 or so for Scarlett Oaks to take her. It didn't work out. The nursing home kicked her out because she would wander around into people's rooms and behave erratically because of her disease and the medication prescribed for her. She was so afraid she had nowhere to go, she was put into the psychiatric ward of Christ Hospital for several weeks in a straight jacket. Have you ever seen your mother in a straight jacket?

After leaving Scarlett Oaks, Mother lived with my sister and her in-laws while my brother-in-law was in grad school and my sister was working. For a while she did volunteer work for a local camp for retarded children so she could feel productive. It helped, but she had to give it up. When my sister moved to Illinois, we put Mother in another nursing home. It was difficult to find anywhere that would accept her. The problem was that she was young, physically well and ambulatory and required more care than someone who was bed ridden. Mother didn't understand she couldn't walk into other people's rooms. They sedated her horribly and tied her into bed and she got horrible bedsores. She was 64 years old. Finally, in the summer of 1986, she had to be put in the full care nursing facility where she had been living, and was diagnosed as having an Alzheimer's Related Disorder. She remains there today tied in her bed, weighing as little as 98 pounds. She is 66. Some time within the year her assets will all be wiped out. She will have to go on Medicaid and we hope she will be able to stay in the same nursing home. She would be working today if she were not ill, but PERS still says she is not entitled to disability benefits.

I have told this story in great detail because it is important for you all to understand how helpless disabled people and their families are. Friends and family other than immediate family members disappear when a humiliating disease starts to take people's minds and good looks. When these things happen to middle aged women who have worked their whole lives at home and never developed another career, they become helpless. My mother's brother and sister offered no help or support. Her husband left her and has a new family. Then her employer denied her a benefit that a 25 year old employee would have been entitled to under the same circumstances. Her disability was denied because Mother continued working instead of giving in to her illness.

The money we lost from PERS would only pay Mother's bills for part of a year longer. We have prepaid funeral expenses already and are preparing to deal with turning her over to the State of Ohio. Then, she will own nothing and the nursing home and the State will be calling all of the shots. The State will collect alimony from my father, her Social Security, if she ever gets it, and her PERS income and will pay the nursing home. If the money doesn't last until next spring, the State can be expected to seize our family house in Michigan. If we want Mother to have anything personal after the money runs out, we will have to buy it for her. My brother and sister and I live have no option to take care of it all ourselves -- we just don't have the $24,000 per year it takes to keep my mother in the nursing home.

The insanity of it all is that those who favor private, rather than public, funding of social welfare programs have seen to it that people like my mother -- who tried to be self sufficient as long as possible -- will enter the public welfare system at an earlier point. Businesses and other employers are permitted to structure their employee benefit plans so that older people who would otherwise make claims under their employers' benefit programs will be forced to go on Medicaid or public welfare. You and I will have to pay for that in our taxes, won't we?

My mother's retirement plan now denies health insurance to disabled employees over 60 who do not have ten years of service. As a result of that provision, if she had become disabled after 1986, she would have no health insurance today through PERS. Her money would be long gone by now if she had no health insurance. She would be on Medicaid today. If she had not vested in her retirement plan, she would not qualify for early retirement even at the reduced rate, and she would get nothing. My mother and people like her earned these benefits as surely as younger employees. Is it right that they should be taken away from her because of her age? My mother's disability retirement would not solve all of the problems that a horrible disease has caused, but every little bit helps in meeting the astronomical costs of this and virtually any other disability.

If I have any regrets, it is that we never said certain things to my mother when she was still aware of what was going on around her. We should have said you have a right to full disability retirement based upon your hard earned salary as a speech pathologist. We are proud of you for having accomplished so much. You are as good and as valid a human being as any man who worked full time for 40 years, because you worked more than full time for your family. We won't leave you and we will take care of everything. You are greatly loved and appreciated. I did not say these things. Being here today to try to do everything I can to try to make her agony count for something is all I can think of to do to make up for that. The horror my mother would feel if she knew she will go on welfare if she survives the year makes me glad she doesn't know.

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Mr. ROYBAL. Thank you. The Chair will now recognize Mr. Robert Laufman.

STATEMENT OF ROBERT LAUFMAN, ATTORNEY AT LAW, LAUFMAN, RAUH AND GERHARDSTEIN, CINCINNATI, OHIO

Mr. LAUFMAN. Thank you, Mr. Chairman. Thank you, members of the Committee, for inviting me here. My name is Robert Laufman of the law firm of Laufman, Rauh & Gerhardstein of Cincinnati, Ohio. I represented June Betts in the Supreme Court and I continue to represent her now that it is back in the Sixth Circuit. I also represent plaintiffs who filed a class action lawsuit against the Public Employees Retirement System of Ohio and two other Ohio pension plans that raises the same issues as were decided by the Supreme Court in the Betts decision.

Today, since Carolyn Betts has already described what has happened to her mother, I would like to discuss the plight of some of the others who are affected adversely by the Betts decision. Because of time, I will not discuss all of them. I would like to select just one of those employees and describe how the Betts decision is affecting her.

But, first, it is useful to understand how these plans discriminate. Ohio law provides that anyone who has 5 years of service may apply for disability retirement unless they have reached the age of 60. An employee who becomes disabled at age 23 can receive 75 percent of his average salary for the rest of his life, even if he lives to be 70, 80 or 90 years. An employee who becomes disabled at age 61 does not qualify for disability at all.

Under regular retirement June Betts receives 10.8 percent of her final average salary. That worked out to $158 per month. Had she been eligible for disability benefits, she would have received the minimum 30 percent, which would have amounted to $355 per month.

A person on disability automatically receives free health care for life. Only those retired employees who have been members of PERS for at least 10 years receive health care. This affects those people who begin working late in life, such as June Betts who began working at the age of 55. Six or seven years later they become disabled. If they are over 60, they are not only receiving less income because of age discrimination, they are deprived of health care for the rest of their life.

Now, I would like to talk about how the Betts decision affects Mrs. Anna Mae Hettesheimer. She is a widow living in Cleves, Ohio. For 32 years, she was a homemaker. In 1979, when she was 53 years old, her husband became permanently disabled and she had to go to work to support her family. She went to work for the Hamilton County Board of Mental Retardation, caring for the mentally retarded.

After working 9½ years, she learned she had cancer. The chemotherapy treatments made her too weak to continue working. She was forced to retire. After PERS told her that she was not eligible for disability benefits because she was over the age of 60. Under regular retirement, she receives $187.50 a month. Had she been eligible for disability retirement, she would have received $455 per month. On top of that, her Social Security benefits are reduced by two-thirds of the income that she receives from PERS.

However, that is not her major problem. Mrs. Hettesheimer's biggest problem is health care. She requires expensive chemotherapy for her cancer. Because she was past the age of 60 when she became disabled, she was not eligible for free health care. She is now paying $179 per month for health care. This is almost three times the net benefits that she gets from her PERS retirement after the reduction of her Social Security. She purchases her health care under COBRA. Next July COBRA runs out and she is going to be without any health care.

I think all of you know that if you have cancer and are age 64, there is no way that you are going to get health care. She is going to be completely uncovered at that time and she is not eligible for Medicare. All of these tragedies to her were the result of the PERS disability plan which denies benefits to workers who become disabled after age 60.

Let us consider concerns of industry. I would like to dispel any concern that overturning the Betts decision with H.R. 3200 is going to wipe out the State pension plan. While the impact on June Betts and Mrs. Hettesheimer is very great, the total impact on the State of Ohio and PERS is going to be relatively small. The reason is only a relative few people are affected by this age 60 rule. Only those people who begin work late in life and then become disabled after 5 to 15 years of service are affected.

If you take the situation of June Betts, the additional cost to the PERS plan would have been $2,358 per year. The PERS plan has $1 billion in assets. It paid $336 million in regular retirement benefits, and $39 million in disability benefits in 1984. When compared to the size of the PERS plan, the additional cost to the plan is minuscule, but it is significant to Mrs. Betts because of the pittance she now receives.

Now I would like to talk about why H.R. 3200 should be passed promptly and without delay. H.R. 3200 has a single purpose, and that is to overturn the Betts decision. We are not talking about new legislation that is going to require extensive study because the impact is unknown. Industry has been obeying the EEOC regulations for 20 years with only a few exceptions. These regulations have been in effect for 20 years. They are proven, and we know exactly what the impact is going to be.

Even management organizations have advised their constituents over the years that the procedures to follow are set forth in the EEOC guidelines and they have urged them to follow them. We are not dealing with radical legislation. All we are asking is that the regulations of the EEOC which have been in place for 20 years be codified.

It is important that legislation be passed before employers begin reducing benefits for older workers. If the Betts decision is not reversed by H.R. 3200, employers will be able to discriminate in all types of benefits, whether it be prepaid legal services, health care, or free parking privileges. I would like to point out why I believe prompt action is necessary, and why I think it can be done quickly. It can be done quickly because this bill does nothing more than reinstate the law the way it was before the Betts decision. Prompt action is necessary to help those whose lawsuits are already in court. My cursory research has shown that the retroactive legislation that is proposed has been upheld by the courts consistently, with one exception. That is when the case that has gone to final judgment. In that case, retroactive legislation has not been effective.

You are going to find that as a result of the Betts decision, the district courts are going to be dismissing these age discrimination cases right and left. Once appeals have been exhausted, those people are going to be beyond help. If you take 1½ years to pass this legislation, as you have in some other bills, it is going to be too late to help June Betts and most of the other people.

I thank you for my opportunity to speak here today. I have letters from five people: Anna Mae Hettesheimer, Robert McGill, Nancy McGill, James Thomas and Carl George, who have been affected by the Betts decision. I ask that they be made part of the record.

[The prepared statement and letters submitted Mr. Laufman follows:]

HEARINGS ON
age discrimination in employee benefit plans and the impact of *Public Employees Retirement System of Ohio v. Betts*, 109 S.Ct. 2854 (1989)

BEFORE

Select Committee On Aging

Subcommittee on Labor-Management Relations

Subcommittee on Employment Opportunities.

September 21, 1989

TESTIMONY OF

Robert F. Laufman
Laufman Rauh and Gerhardstein
1409 Enquirer Building
617 Vine Street
Cincinnati, Ohio 45202
(513) 621-9100

Thank you for inviting me to appear at this hearing.

My name is Robert F. Laufman of the law firm of Laufman, Rauh and Gerhardstein of Cincinnati, Ohio.

I have represented June Betts throughout her litigation and argued her case in Public Employees Retirement System v. Betts, 109 S.Ct. 2854 (1989). I also represent plaintiffs in a class action against PERS and two other State of Ohio Pension plans raising identical issues.

Today, I am here to discuss the plight of some of the class action members who are suffering as a result of the Supreme Court's decision in Betts.

Impact of the Betts Decision

Carolyn Betts has already described the effect age discrimination in employee benefits had on her mother. Now, I would like to describe the impact age discrimination in employee benefits is having on three other members of the Public Employees Retirement System (PERS).

Anna Mae Hettesheimer is a widow who lives in Cleves, Ohio. Her medical condition prevents her from attending this hearing.

Mrs. Hettesheimer was raised in Cincinnati. In 1944, after graduating from high school, she worked for three years until she left her job to raise a family. For the next 32 years, she was a homemaker for her husband and their children, but in 1979, when she was 53, her husband became totally disabled and she went back to work. Mrs. Hettesheimer's employer was the Hamilton County Board of Mental Retardation and Developmental Disabilities, June Betts' former employer. For 9 1/2 years, as an employee of the Hamilton County Board of Mental Retardation and Developmental Disabilities, she cared for the mentally retarded, and then Mrs. Hettesheimer learned she had cancer. When chemotherapy made her too ill to work, she submitted her application for disability retirement to PERS. PERS promptly denied her disability retirement because she was over 60 years of age. By July 1988 she had used up her sick leave and went on unpaid sick leave. Finally, in April of this year she applied for regular retirement.

On regular retirement she receives only $187.50 per month but since her Social Security survivor's benefits are reduced by two-thirds of her pension, she nets only $62.50 per month. Had she been eligible for disability retirement, she would have received $455 per month.

A bigger problem for Mrs. Hettesheimer is health care. Members of PERS who receive disability retirement benefits also receive free health care for life. Because she has been denied disability benefits due to her age, she is also denied health care benefits. Instead, she must purchase her own health care for $179.37 per month, which is more than the amount she nets from PERS disability. When her right to purchase medical coverage under COBRA runs out in July, 1990, she will be 64 and ineligible for Medicare. No insurance company will sell health care coverage to a person receiving treatment for cancer at any price. At that point she will have extensive medical expenses, but will be unable to purchase medical coverage. For 35 years she didn't use her health care and soon she will be without it when she needs it most. But for the Supreme Court's decision in Betts, she would receive both disability benefits and health care.

Robert E. McGill lives in Tionesta, Pennsylvania. For nearly 10 years he was the director of the News Service at Youngstown State University, Youngstown, Ohio. Prior to that he was a reporter and news editor for the Sharon Reporter in Sharon, Pennsylvania.

In 1988, Mr. McGill was hospitalized for lung cancer and has been confined to his home since August of that year. His wife was forced to quit her part-time job so she could care for him.

After using all of his accumulated sick leave and vacation days, he was forced to retire on March 31, 1989 from his position at Youngstown State University where he had been employed since November 1979. Because he was over 60 years of age he was not eligible for disability retirement.

At the time of his retirement he was earning $32,000 per year and his wife had her earnings from her part-time employment. On retirement he will receive only $501 per month from PERS. Two-thirds of that amount will be deducted from his Social Security benefits which are presently $686. Had he been eligible for disability benefits, he would have received benefits of $800 per month.

Like Mrs. Hettesheimer, Mr. McGill is not eligible for health care coverage that is automatically provided to those on disability retirement. He now pays $419 per month for health coverage for himself and his wife. Members of PERS who become disabled before age 60 continue to receive free health care for the rest of their lives.

Carl George lives in Hamilton, Ohio. He is a U.S. Navy veteran of the Normandy invasion in World War II. He worked as an auto mechanic until his employer went out of business. Beginning in 1977, he worked for 8 years as an auto mechanic for the sheriff of Hamilton County until injuries and arthritis in both knees made it impossible to work in his occupation. Although he had always planned on working until he could retire with full benefits he was forced to apply for retirement after PERS advised him that he was too old for disability benefits.

At the time of his retirement Mr. George had been earning $19,000 per year. Had he been eligible for disability benefits he would have received monthly income of $475. Instead, with the military service credits he purchased from PERS he receives $259 per month.

The Ohio Plans

In addition to the Public Employees Retirement System (PERS), there are two other similar retirement plans for governmental employees. Both the State Teachers Retirement System (STRS) and the School Employees Retirement System (SERS) also deny disability benefits to members after age 60 while continuing full benefits for life to those members disabled before reaching 60.

There are nearly one million members in these three retirement systems. While the number of members is very great, the impact of the proposed legislation on these plans will be minimal compared to the misery of those few members excluded because of their age. Only those members who become disabled after age 60 who have more than 5 years service and less than 15 years service credit are affected by the age 60 disqualification. Those with less than 5 years service are not eligible for either retirement or disability. Those with over 15 years service receive greater benefits on retirement than they would on disability. The number of employees who begin their careers with the state late in life is too small to have a significant impact on the fiscal stability of the retirement plans should they become eligible for disability benefits.

In June Betts' case, the additional cost to the PERS plan had she been eligible for disability benefits was $196.52 per month or $2358 per year. Compare this to PERS' assets of over $1,000,000,000 and its payments of retirement benefits of $336,443,286.01 and disability benefits of $39,772,278.07 in 1984.[1]

While the disability plans are open to all individuals under the age of 60 with at least five years of service credit, those individuals, such as June Betts, who apply after their 60th birthday are denied disability benefits. Thus, a worker disabled at age 23 may still be receiving 75% of his salary in disability benefits at age 65, while a worker disabled at age 65 will receive no disability benefits and retirement benefits as low as 10%.

Membership in PERS is in lieu of participation in the federal Social Security program. Thus, while most private company employees have pensions in addition to Social Security benefits, most public employees receive only their PERS benefits. For those who receive both Social Security benefits and PERS retirement benefits, the Social Security benefits are reduced by an amount equal to two-thirds of the PERS benefit.

In addition to lower benefits, workers disabled after age 60 are denied two other benefits due to their exclusion from the PERS disability plan:

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[1] Supreme Court Brief of PERS, pages 5-6.

1. Those with less than 10 years service are denied free medical coverage for life.

2. Each person excluded from the disability plan is denied a five year leave of absence with a guaranteed right to return to his or her former job or its equivalent with his or her former employer. This right is available to all workers receiving disability benefits but not to workers on service retirement.

In addition to the class action brought by members of PERS, STRS and SERS, the EEOC also has a class action against these plans. The members of these class actions all will lose their rights to disability benefits and health care unless retroactive legislation is passed without delay.

Prompt Action Is Required

Prompt action is required in order to rescue the victims of the Supreme Court's decision in Betts. H.R. 3200 provides retroactive application to "all actions or proceedings brought under the [ADEA] after June 23, 1989, and actions or proceedings brought under such Act prior to June 23, 1989 which were pending on June 23, 1989." The courts have generally recognized this type of retroactive legislation as long as the proceedings are still pending at the time the legislation becomes law. Where proceedings have proceeded to final judgment, plaintiff's only recourse is to seek relief from the judgment or file a new lawsuit. These efforts have generally been unsuccessful.

The EEOC has reported that it has 30 cases now pending in federal court that involve allegations of benefits discrimination. These cases, as well as many private lawsuits, are all at risk unless retroactive legislation is promptly passed. The courts are already beginning to dismiss some of these lawsuits based on the Betts decision. Once their appeal time has run, it is unlikely retroactive legislation will benefit the very people it was intended to aid. It is essential that H.R. 3200 become law this session.

H.R. 3200 Should Be Passed Promptly Without Change

As introduced, H.R. 3200 has a single purpose; to overturn the Supreme Court's decision in Betts. This is not new legislation requiring extensive study. H.R. 3200 would merely restore the EEOC regulations (29 C.F.R. § 1625.10) which were rejected by the Supreme Court. Unlike new legislation whose effect is uncertain, the impact of this Bill is known since the regulations have been in effect for 20 years and in their present form for 10 years. Thus, extensive study and further hearings is unnecessary.
As Senator Heinz observed, "for 20 years since the enactment of the ADEA, businesses have been comfortably operating under these

regulations."[2] Senator Metzenbaum noted that the Supreme Court's decision "reverses 20 years of settled law, including regulations supported by the Johnson, Nixon, Ford, Carter, Reagan and Bush administrations, and the unanimous judgment of five United States Courts of Appeals."[3]

Even, the Equal Employment Advisory Council, a nationwide association of employers and trade associations which filed a friend of the court brief on behalf of PERS, has advised employers to rely on these EEOC regulations:

> "[s]ince the 1978 Amendments to the ADEA extended ADEA protection to age 70, employers may no longer engage in the common practice of completely cutting off long-term disability benefits for all disabled employees and long-term coverage for all active employees at age 65. However, employers may lawfully reduce long-term disability benefits for older employees who are under 70 when such reductions are cost justified." (emphasis added)[4]

This is not radical new legislation you are now considering. You are being asked to codify regulations which have been in place for 20 years and which business and industry have adhered to, with only a few exceptions.

It is vital that H.R. 3200 be passed without delay. In addition to the 30 cases being litigated by the EEOC, there are many more private actions similarly affected by this legislation. As the courts dismiss these cases in reliance of the Supreme Court's Betts decision, those dismissals will become final judgments. While H.R. 3200 provides for retroactive application, my research shows that the courts have not applied retroactive legislation to those cases which have proceeded to a final judgment.

Attached are letters from Anna Hettesheimer, Robert McGill, Nancy McGill, James Thomas and Carl George who are unable to attend these hearings because of illness. I ask they be made a part of the record.

Prompt passage of H.R. 3200 is crucial to them, to June Betts, and to others negatively impacted by the Betts decision.

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[2] 108 Cong. Rec. S7687 (daily ed. July 11, 1989).

[3] 108 Cong. Rec. S9550 (daily ed. Aug. 3, 1989).

[4] AGE DISCRIMINATION IN EMPLOYMENT ACT: A Compliance and Litigation Manual for Lawyers and Personnel Practitioners p.339. Published by the Equal Employment Advisory Council (1982).

Dear Sirs

I would like to express my feelings and concerns regarding my situation. I worked for the Hamilton County Board of Mental Retardation a job which I obtained in 1979. My husband became ill and had to go on total disability. I had to go back to work in order for us to live. I belonged to the PERS retirement, I worked for them for over nine years when in May 1988 I became ill with cancer. I had to quit work because of my illness and filed for total disability. I was refused by PERS because I was over 59 years of age

I held off filing for retirement until after my 10 year Anniversary, March 1989, on filing PERS would not give me any health coverage because I was not on the payroll since August 1988 was when my sick days were used up They considered my termination when my sick days ran out and back dated my retirement to August 1988

When my health coverage ran out, February 1989, I was put on the COBRA Plan which I pay 179^{30} a month In July 1990 my COBRA runs out. I will be 64 yrs old and not eligible for Medicare. Where do I go from there. No one will pick me up with an existing disease and with the cost of health care I will not be able to afford treatments

I have had health care coverage for many years and was fortunate not having to use it. Now when I need it the most in my life I am being denied because of my age

I am at a stage in my life when I should be able to enjoy what's left of my life and have less worries, but in my case it is not so. My worries and concerns have compounded more than any time in my whole life. I got a disease which has disabled me eight months too early and after age 59.

Sincerily

Ann Hetterheimer

July 9, 1989

Hon. Howard M. Metzenbaum
140 Russell Senate Office Bldg.
Washington, D. C. 20510

Dear Senator:

Last month the U. S. Supreme Court heard a case, Public Employees Retirement System of Ohio vs. Betts: I was a part to this class action. The attorney who represented Ms. Betts has advised that you are contemplating legislative action to correct the injudicious decision of the court. I hope the information I'm enclosing will assist you in correcting this form of age discrimination.

On September 25, 1985 I was placed on involuntary sick leave by my supervisor at Sinclair Community College, 444 W. Third St., Dayton, Ohio 45402, where I was employed for more than ten years.

For the next several days, weeks and months my efforts to return to my job were rebuffed by my employer. My huge backlog of sick leave and vacation time was being exhausted. Finally, in an effort to make certain I would have an income, I filed with the Public Employees Retirement System a request for a disability retirement. I was 63 years of age at this time. In a letter from the Public Employees Retirement System (PERS) I was informed that age 60 members were no longer eligible for the disability benefits of the program. As a result of this situation I was compelled to accept the standard retirement which provided far less money. My retirement date was March 1, 1986.

Another fringe benefit provided employees at Sinclair Community College was an insurance policy with Teachers Insurance and Annuity Assoc., P. O. Box 1668, New York, N. Y. 10164 (TIAA). Here again I suffered age discrimination. I was advised that those age 60 or older could collect disability benefits for only five years while those under 60 could receive disability benefits for the remainder of their lives.

It seems so improper for elderly people, at the time in their lives when they most need disability benefits to be denied them by actuarial tables.

Thank you for your early attention to this matter.

Sincerely,

James F. Thomas
1122 S. Miami St.
West Milton, OH 45383

cc: Robert F. Laufman, Atty.

September 15, 1989

Subcommittee On Employment Opportunities
102 Cannon
House Office Bldg.
Washington D.C. 20505

When my husband was told he had inoperable lung cancer we were devestated.

We had been remodeling our summer home and planned to move there when Bob retired the end of 1989. This would give him 10 years and a small pension and our hospitilization paid by PERS. We thought we had things well planned.

Bob tried to continue working while taking radiation treatments but found it too difficult with all the side effects. He also had surgery similar to open heart surgery to implant radioactive seeds as a preventive measure. His lung collapsed twice, he had numerous infections, a massive bleeding spell and then developed shingles.

Through all this he has maintained a very positive attitude and continued fighting to have as normal a life as possible under these circumstances.

While he was in the hospital, our house was sold in Hermitage, we moved into our unfinished summer home, added a bedroom and bath on the first floor and have had months of extra work, confusion and expense.

The problems of being turned down by PERS have just compounded our situation.

When you are so sick, other problems simply add to your already heavy burden. Cancer is an emotional disease as well as physical and these monetary problems have made Bob's recovery more difficult.

We feel we deserve the paid hospitilization and appreciate your consideration.

Thank you.

Sincerely yours,

Nancy M. McGill

Nancy M. McGill
(Mrs. Robert E. McGill)

September 15, 1989

Subcommittee onEmployment Opportunities
402 Cannon
House Office Bldg.
Washington D.C. 20515

I have been hospitalized and confined to my home with lung cancer since August 1988. I used all my accumulated sick leave and vacation and on March 31 of 1989 was forced to retire as Director of the News Service at Youngstown State University, where I has been employed since November of 1979.

My request for disability retirement was denied by Public Employees Retirement System of Ohio and the University because I was over 60 years of age.(63) This is clearly discrimination because of my age.

I am presently receiving $686 a month from Social Security and have to pay $410 a month for my hospitilization.

In addition to the current monetary loss, losing the disability pension will cost me many thousands of dollars in hospitilization from PERS. Upon finishing the (10) years at YSU (nov. 1989) I would have been eligible for free hospitilization the rest of my life from PERS.

The loss of my job and regular pay check plus the hassels over the disability question have made me very upset. I am on oxygen 24 hours a day as a result of my lung cancer plus large amounts of medication. The stress and concern over the disability rejection has greatly increased my breathing problems and physical well being.

Thank you for your consideration.

Sincerely,
Robert E. McGill

Robert E. McGill
Box 383
Tionesta, Pa. 16353

Sept. 13, 1989

Dear Mr Martinez

I was an employee of the Hamilton County Sheriffs Dept. I was told by my employer that I was not eligible for disability retirement because I was 60 years old, and forced to take a voluntary retirement through PERS on December 16 1985. In February 1986 I paid to PERS $1917.98 to receive service credit of 2.252 years, and now I am receiving $259.53 monthly from PERS Also I am receiving $444.00 from Social Security. Under PERS disability retirement I would receive 30% of approximate $19,000, or about $475.00 per month. The extra money would help us very much. We are at or below the poverty level. We purchased a used Mobile

Home with our savings. The lot rent increases every year. This mobile Home is a 1973 model. I am driving a 1979 model car which needs frequent repairs, and maintenance. Our needs for dental and eye care are a luxary we cannot consider.

I am presently 65 years old and totally unable to work.

I hope you will do what you can to reverse the Supreme Courts decision on the Betts versus P.E.R.S. case. Which would help me, and others like me.

Thank You
Sincerely
Carl George

Mr. **Roybal**. Thank you. Without objection, that will be the order.

The Chair recognizes Ms. Silberman.

STATEMENT OF R. GAULL SILBERMAN, VICE CHAIRMAN, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Ms. **Silberman**. Good morning, Mr. Chairman and committee members. I have submitted written testimony as well, which I request be made part of the record.

Mr. **Roybal**. All the written testimony will become part of the record.

Ms. **Silberman**. I would like to make a few comments this morning. Thank you for asking me and our general counsel, Charles Shanor, to testify today. I am Ricky Silberman, Vice Chairman of the EEOC, the Equal Employment Opportunity Commission. Also, I would like to introduce Evan Kemp, who is sitting in the audience. Commissioner Kemp is the Chairman-designate of the EEOC.

The EEOC enforces the Age Act. We appeared as *amicus* on behalf of June Betts before the Supreme Court in the Betts case. I think it is fair to say that no one was more surprised than we when on June 23, the Supreme Court handed down its decision in the Betts case, invalidating the EEOC's long-standing interpretation that the Age Discrimination and Employment Act prohibited discrimination against older workers with respect to employee benefits. H.R. 3200 would amend the Age Act to explicitly prohibit such arbitrary age discrimination. I welcome the opportunity to give the EEOC's views on this very important legislation.

Older workers are a growing and vital segment of our Nation's workforce. Benefits have become an integral part of their compensation, no longer the frosting on the cake. Many of these benefits are, as a practical matter, unavailable to individuals on the open market. For older workers particularly, employment means access to crucial benefits.

The Age Act protects older workers against discrimination in hiring, firing, compensation, and terms and conditions of employment. We see no good policy reason for allowing arbitrary, unjustifiable discrimination against older workers in the area of benefits when all other aspects of their employment are covered. We believe prompt legislative action will return the law to its pre-Betts status, and protect older workers from further uncertainty about their future.

Let me comment on the effect of the Betts decision on the EEOC's enforcement efforts. Some 30 EEOC cases currently in litigation are affected by Betts. The general counsel will address these in more detail. We have 406 open charges that raise benefit issues. Until these charges have been thoroughly investigated and determinations have been issued, we really can't estimate how much money is involved or how many people are affected. We do know that benefits cases by their very nature involve large groups of older workers and large sums of money.

H.R. 3200 would bring benefits back under the coverage of the Age Act. It would also revise the Section 4(f)(2) defense by eliminating the subterfuge language and codifying the EEOC's Interpretive

Bulletin's equal cost principle. The EEOC believes codifying this equal cost principle would provide the most appropriate rule for determining when age differentials should be permitted in benefit plans, consistent with the purposes of the Age Act—with one significant exception which I will speak to in a few minutes.

In the Betts case, the EEOC argued that the employer had unlawfully deprived June Betts of disability benefits because of her age since the employer had failed to prove or even offer any economic justification for this denial. We urged the Supreme Court to restore these valuable benefits to Ms. Betts under the principles of our Interpretive Bulletin. But the Supreme Court rejected that argument, holding that age-based benefit denials under bona fide benefit plans are "exempt from the prohibitions of the ADEA" unless the plans discriminated in "non-fringe benefit aspects of employment".

Now, it is well to note that the Interpretive Bulletin has been in effect since 1979, and has generally provided a workable, fair framework for evaluating benefit plans. But a number of developments have taken place since 1979, that were not envisioned in the Interpretive Bulletin. Most notably, the Age Act has been amended several times with respect to mandatory retirement. Once the age cap was raised from 65 to 70 in the 1978 amendments, and then finally abolished in 1986, some employers began to offer valuable incentives to older workers to retire early voluntarily. ERISA was also passed, TEFRA, DEFRA and COBRA. Developments like these prompted the EEOC to issue two advance notices of proposed rulemaking to gather information about employers' and employees' experiences under the Interpretive Bulletin and about their use of early retirement incentives.

The comments we received, and I think this is very important, from both employers and employee representatives, with one salient exception, generally expressed support for the basic provisions of the Interpretive Bulletin. The EEOC was in the process of evaluating the comments and considering its options when the court handed down Betts. During this same period, the second Circuit Court of Appeals, in a case called Cipriano, asked the commission to comment on the legality of early retirement incentive plans. The court questioned whether the interpretive bulletin applied to such plans. In our brief, as *amicus curiae* in that case, the commission concluded that the Interpretive Bulletin's equal cost rule was not intended to apply to early retirement incentive programs, and moreover, is ill-suited to such voluntary programs. This position was adopted by the U.S. District Court for the Western District of New York on remand.

Retirement incentive plans, if truly voluntary, can provide valuable additional benefits and expand options for older workers, allowing them to gain the financial resources to take early retirement, to move on to new employment elsewhere, and to avoid involuntary termination. If such plans further the purposes of the ADEA, the EEOC believes they should be lawful. We also believe that under H.R. 3200 some of these voluntary retirement incentive plans may be rendered unlawful by the new Section 4(f)(2)(B), even though they do in fact further the purposes of the Age Act.

The commission believes programs that are completely voluntary and further the purposes of the ADEA as set forth in Section 2(B) should remain lawful. To the extent that such programs are challenged, and they will be challenged, their legality can best be adjudicated on a case-by-case, fact-specific basis in light of their intent and actual operation. With the addition of such language that will preserve voluntary early retirement incentive programs, H.R. 3200 would restore employment rights of great value to older workers. The words of Ms. Betts who I am privileged to follow this morning is living testimony to that.

The EEOC commends the Congress and these committees for addressing this issue. And we look forward to working with the committee in seeing that this legislation, which will restore these valuable rights to older workers, comes to fruition.

[The prepared statement of Ms. Silberman follows:]

TESTIMONY OF
R. GAULL SILBERMAN, VICE CHAIRMAN
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BEFORE THE SUBCOMMITTEES ON EMPLOYMENT OPPORTUNITIES AND LABOR-MANAGEMENT RELATIONS
OF THE
COMMITTEE ON EDUCATION AND LABOR
AND
THE SELECT COMMITTEE ON AGING
U.S. HOUSE OF REPRESENTATIVES
SEPTEMBER 21, 1989

Good morning Chairmen and committee members. I am Ricky Silberman, Vice Chairman of the Equal Employment Opportunity Commission. With me is the EEOC's General Counsel Charles Shanor. On June 23, 1989, the Supreme Court handed down its decision in Public Employees Retirement System v. Betts, which invalidated the EEOC's long-held view that an employer may not discriminate against older workers with respect to employee benefits. H.R. 3200, The Older Workers Benefit Protection Act, would amend the Age Discrimination in Employment Act to make clear that the Act prohibits arbitrary age discrimination in employee benefits, and would codify the principle embodied in the EEOC's Interpretive Bulletin interpreting section 4(f)(2) of the Age Act. I welcome this opportunity to give the EEOC's views on this important legislation. I also note that the Administration may be providing additional comments on the legislation in the near future.

Older workers are a growing and vital segment of our nation's work force. H.R. 3200 would restore protections older workers have come to expect under the administrative and judicial interpretation of the Age Act that had prevailed for two decades. Fringe benefits are a valuable component of the employment relationship, as significant to the employee as other terms and conditions of employment. We see no good policy reason for allowing arbitrary, unjustifiable discrimination against older workers in this one area when all other aspects of their employment are protected. Amending the Age Act to clarify the prohibition against benefits discrimination is designed to adopt EEOC's prior interpretation of the Act. The Commission believes that prompt legislative action will cause the least disruption to the existing system of employee benefit plans. Moreover, if Betts is not reversed, older workers will face increasing uncertainty about their future benefits.

Before discussing specific provisions of H.R. 3200, I thought it would be helpful to tell you what we know to date about the impact Betts may have on the EEOC's enforcement efforts. With respect to litigation, the Betts decision affects more than 30 of EEOC's cases now at the trial or appellate levels. This is out of a total of approximately 253 ADEA cases in active litigation. As to administrative enforcement, we estimate that 406 open charges may raise issues covered by the Betts decision.

For reference, we currently have approximately 11,608 ADEA charges, 21.1 percent of the 54,906 total charges in our inventory. Until the charges have been thoroughly investigated and determinations have been issued, we are unable to estimate the amount of money involved.

To turn to the bill, H.R. 3200 is consistent with the established policies of the EEOC regarding section 4(f)(2) of the Age Act as set forth in the Interpretive Bulletin, issued by the Department of Labor in 1979 and adopted by the EEOC, and with the position we took in the Betts litigation. In Betts, we argued that the employer had violated the Age Act by denying disability benefits to Ms. Betts because of her age. The employer had failed to prove or even offer any economic justification under section 4(f)(2) of the act, that is, that it cost more to provide disability benefits to older workers. Thus we urged the Supreme Court to adopt the Interpretive Bulletin's "equal benefit or equal cost" approach as the proper interpretation of 4(f)(2) in the Betts case.

The Supreme Court, as we all know, not only rejected that argument but also held that age-based benefit denials under bona fide benefit plans that are not a "subterfuge" to evade the ADEA are "exempt from the prohibitions of the ADEA." The Court held a plan could be a "subterfuge" only if it was used to discriminate in non-fringe-benefit aspects of employment. H.R. 3200 would make clear that the Age Act prohibits arbitrary age discrimination in benefit plans even when the plan is not used to discriminate in other aspects of employment.

H.R. 3200 also revises the section 4(f)(2) defense. It would eliminate the "subterfuge" language and codify the Interpretive Bulletin's "equal cost" principle as the only way to justify age differentials in benefit plans. With the significant exception I will speak to in a moment, the EEOC believes codifying this "equal cost" principle would provide the most appropriate rule for determining when age differentials should be permitted in benefit plans consistent with the purposes of the Age Act. The Commission also endorses the legislation's codification of the so-called "benefit package" rules of the Interpretive Bulletin which permitted, under specific circumstances, the combination of certain benefits such as life and long-term disability insurance, for purposes of calculating the benefits provided to, and costs incurred for, older workers. The General Counsel will address this aspect of the bill in more detail. But first I think it would be helpful for me to give you some historical background.

The Interpretive Bulletin has been in effect since 1979 and has generally provided a workable, fair framework for evaluating benefit plans. But a number of developments since 1979 have affected the Interpretive Bulletin. The Age Act has been amended several times, most notably in 1986 to lift the age-70 upper limit for coverage for most employees. Additionally, since 1979 there has been a proliferation of voluntary early retirement incentive plans. Such voluntary incentive plans were not at all common in 1979 because until the 1978 ADEA amendments, employers could lawfully retire employees involuntarily, solely on the basis of age (if pursuant to a bona fide plan), and under any circumstances at age 65. Thus, the Interpretive Bulletin did not contemplate voluntary retirement incentives.

These changes prompted the EEOC last year to issue two advanced notices of proposed rulemaking to gather information about employers' and employees' experience under the Interpretive Bulletin, and about early retirement incentives. The comments we received in response, from employers and employee representatives alike, generally expressed support for the basic provisions of the Interpretive Bulletin and advocated changes of a technical nature to update it. The EEOC was in the process of evaluating the comments and considering its options when the Court handed down Betts.

The Commission had concluded that the Interpretive Bulletin's "equal cost" rule was not intended to apply to early retirement incentive programs, and is ill-suited to this type of voluntarily chosen benefit. We took this position in Cipriano v. Board of Education of North Tonowanda, which was adopted by the U.S. District Court for the Western District of New York. Retirement incentive plans, if truly voluntary, can provide valuable additional benefits and expand options for older workers, allowing them, for example, to gain the financial resources to take early retirement, to move on to new employment elsewhere, and to avoid involuntary termination. If such plans further the purposes of the ADEA, the EEOC believes they should be lawful.

Under H.R. 3200, some voluntary retirement incentive plans may be rendered unlawful by section 4(f)(2)(B), even though they in fact further the purposes of the Age Act. The Commission believes programs that are completely voluntary and further the purposes of the ADEA as set forth in section 2(b) should remain lawful. To the extent such programs are challenged, their legality can best be adjudicated on a case-by-case, fact-specific basis in light of their intent and actual operation.

H.R. 3200, with the addition of language which will preserve voluntary early retirement incentive programs, would restore employment rights of great value to older workers.

The General Counsel and I will be pleased to answer any questions you may have.

Mr. ROYBAL. Mr. Shanor, will you please proceed in any manner that you may desire.

STATEMENT OF CHARLES A. SHANOR, GENERAL COUNSEL, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Mr. SHANOR. Thank you. Mr. Chairman, Committee members, since Vice Chairman Silberman has provided you with a broad overview of EEOC's views on this bill, I will limit my remarks to technical comments on the major provisions and offer my opinion on how these provisions reverse Betts.

First, Betts generally held that age-based discrimination in benefits plans is not actionable under the ADEA. This holding was contrary to long-standing EEOC views. H.R. 3200 will restore EEOC's position that benefits discrimination is generally prohibited under the ADEA by defining terms, conditions and privileges of employment to encompass all employee benefits.

Second, Betts held that Section 4(f)(2) of the ADEA is not an affirmative defense but part of the employee's prima facie case. Again, this holding was contrary to the EEOC's interpretation. H.R. 3200 would reverse this holding of Betts, restoring EEOC's view that an employer has the burden of proving that such benefits discrimination is nevertheless authorized by the ADEA.

Third, Betts held that an employer could engage in benefits discrimination against older workers even when it could not justify the discrimination by increased costs of providing benefits to older workers. H.R. 3200 restores the EEOC's view that an employer cannot discriminate against an older worker unless the employer can cost justify this discrimination.

Fourth, Betts indicated continuing confusion over the status of pre-ADEA benefit plans under the act. H.R. 3200 would make Congress' intention clear that, "An employee benefit plan shall comply with this act regardless of the date of adoption of such system or plan." This would reestablish the EEOC's position that pre-ADEA benefit plans are subject to the same legal rules as those which apply to post-act plans.

Other portions of H.R. 3200 are consistent with pre-Betts EEOC interpretations of the ADEA, interpretations with which the vast majority of American employers have been fully complying with for many years. For example, it enables employers to pay equal amounts for each employee's benefits even though, because of age-related cost considerations, an older employee might receive less comprehensive benefits than a younger employee. By permitting an older employee to receive greater benefits than a younger employee, H.R. 3200 simplifies an EEOC interpretation which permits the extension of additional benefits to older workers to counteract problems of age discrimination.

Additionally, H.R. 3200 would codify the EEOC's benefit package interpretation. Such packaging of benefits is an exception to the normal issue-by-issue, benefit-by-benefit approach to Title VII and the ADEA towards discrimination and permits some employer flexibility to aggregate like benefits when such grouping would enhance employee welfare.

Incidently, EEOC believes that the bill's codification of the IB benefit package rules leaves the agency ample authority otherwise to revise the IB to conform to changes in the law or to clarify interpretative ambiguities. For example, EEOC believes the bill does not eliminate 5 year bracketing, does not eliminate coordination of private and government benefits, and permits reliance on generally accepted actuarial tables.

We therefore perceive that this is a bill which generally opens no closed issues, and closes no open issues. It leaves intact the Interpretive Bulletin and disputes concerning the Interpretive Bulletin's meaning. As the Vice Chairman noted, however, there is one salient exception. EEOC is concerned that some early retirement benefits valuable to older workers will be eliminated by this bill.

Specifically, we are concerned that some such early retirement incentives will not meet the cost of benefits test. And because the Interpretive Bulletin was written before the era of early retirement incentives, the Interpretive Bulletin does not address them. We therefore recommend that the bill be amended to permit voluntary early retirement incentives consistent with the ADEA's purposes.

Finally, I wish to address the fact that H.R. 3200 would apply to pending actions or proceedings. EEOC has over 30 cases pending in trial and appellate courts around the country which challenge benefit plans as being unlawful under the ADEA. These cases affect many thousands of employees. We currently estimate that over half of these cases would require dismissal in light of Betts absent remedial legislation. Another quarter of these cases, we believe, will survive Betts, though these generally would be narrowed significantly by that decision. The final quarter of these cases cannot be assessed accurately until further discovery is completed.

Yesterday, in fact, EEOC received two orders from a District Court denying our request that it stay cases pending action on this bill. Section 5 of this bill, if promptly enacted, would preserve these pending cases.

If the committee has any questions, I would be delighted to answer them as best I can.

[The prepared statement of Mr. Shanor follows:]

TESTIMONY OF
CHARLES A. SHANOR, GENERAL COUNSEL
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

BEFORE THE SUBCOMMITTEES ON EMPLOYMENT OPPORTUNITIES
AND LABOR-MANAGEMENT RELATIONS
OF THE
COMMITTEE ON EDUCATION AND LABOR
AND
THE SELECT COMMITTEE ON AGING
U.S. HOUSE OF REPRESENTATIVES
SEPTEMBER 21, 1989

Mr. Chairman, Committee Members. I am Charles A. Shanor, General Counsel of the Equal Employment Opportunity Commission, and I am here today to testify concerning H.R. 3200, a bill designed to restore pre-*Betts* executive branch interpretations of ADEA Section 4(f)(2). Since Vice Chairman Silberman has provided you with a broad overview of EEOC's views on this bill, I will limit my remarks to technical comments on the major provisions, and offer my opinion on how these provisions "reverse" *Betts*. I would also like to note that the Administration may be providing additional views on this legislation in the near future.

First, Public Employees Retirement System of Ohio v. Betts generally held that age-based discrimination in benefits plans is not actionable under the ADEA. This holding is contrary to EEOC regulations. H.R. 3200 would restore EEOC's position that benefits discrimination is generally prohibited under the ADEA by defining "terms, conditions and privileges of employment" in section 4(1) to encompass all employee benefits.

Second, Betts held that section 4(f)(2) of the ADEA is not an affirmative defense but part of the employee's prima facie case. Again, this holding was contrary to the EEOC's interpretation. H.R. 3200 would reverse this holding of Betts, and restore EEOC's view that an employer has the burden of proving that such benefits discrimination is nevertheless authorized by the ADEA.

Third, Betts held that an employer could engage in benefits discrimination against older workers even when it could not justify the discrimination by increased costs of providing benefits to older workers. H.R. 3200 restores the EEOC's view that an employer cannot discriminate against an older worker unless the employer can justify the discrimination by significant age-related cost considerations.

H.R. 3200's affirmative defense restores the EEOC's position that an employer may "observe the terms of a bona fide employee benefit plan where... the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker...."

Fourth, Betts indicated continuing confusion over the status of pre-ADEA benefit plans under the act. In United Airlines v. McMann, the court had held that such plans were never covered by the ADEA. In Betts, the court declined EEOC's invitation explicitly to reject that holding. H.R. 3200 would make Congress' intention clear on this point by enacting statutory language requiring that "A seniority system or employee benefit plan shall comply with this Act regardless of the date of adoption of such system or plan." This would reestablish the EEOC's position, 22 years after passage of the ADEA, and after Congress in 1978 said it intended to apply the ADEA to pre-Act plans, that pre-ADEA benefit plans are subject to the same legal rules as those which apply to post-Act plans.

Other portions of H.R. 3200 are consistent with pre-Betts EEOC interpretations of the ADEA. For example, the bill enables employers to pay equal amounts for each employee's benefits even though, because of age-related cost considerations, an older employee might receive less comprehensive benefits coverage than a younger employee. By permitting an older employee to receive greater benefits or an employer to incur greater costs for an older than for a younger employee, H.R. 3200 simplifies EEOC's interpretation at 29 CFR 1625.2(b), which permits the extension of additional benefits to older workers to counteract problems of age discrimination.

Additionally, H.R. 3200 would codify the EEOC's "benefit package" interpretation at section 1625.10, title 29, Code of Federal Regulations, which, as Vice Chairman Silberman has said, would, under specific circumstances, permit the combination of certain benefits for the purposes of calculating benefits provided to older workers. "Packaging" of benefits is an exception to the normal issue-by-issue, benefit-by-benefit approach of Title VII and the ADEA towards discrimination and permits some employer flexibility to aggregate like benefits when such grouping would enhance employee welfare.

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Finally, I wish to address the fact that H.R. 3200 would apply to pending actions or proceedings. EEOC has over thirty cases pending in trial and appellate courts around the country which challenge benefit plans as being unlawful under the ADEA. We currently estimate that over half of these cases would require dismissal in light of _Betts_ absent remedial legislation. Another quarter of the cases, we believe, will survive _Betts_, though these generally would be narrowed significantly by _Betts_. The final quarter of these cases cannot be assessed accurately until further discovery is completed. Section 5 of this bill would preserve these pending cases.

If the Committee has any questions, I would be delighted to answer them as best I can.

Mr. ROYBAL. Thank you, Mr. Shanor.

The committee will now go into a 5-minute rule which means that each Member will have 5 minutes to question the witnesses. At the end of the 5 minutes, I will use the gavel so that no one goes beyond the 5-minute limit.

After we have all asked some questions for 5 minutes, we will start the process all over again if it is necessary. The Chair will now recognize Chairman Martinez for 5 minutes.

Mr. MARTINEZ. Thank you, Mr. Chairman. Since I only have 5 minutes, let me try to do this quickly.

Mr. Shanor, you talked about the cases that are pending. What happens, between now and the date that this bill would be acted, to those cases that would have been closed? What would happen in those cases?

Mr. SHANOR. Well, Mr. Martinez, I believe, based on the language of the bill, that we would certainly argue that those cases can be restored, refiled if necessary, and so on, because of the Congress' intention to preserve causes of action at whatever time they arose. However, it would certainly complicate our efforts to maintain those cases, and courts might hold that our position on that issue was incorrect.

Mr. MARTINEZ. Would EEOC automatically open those cases, or would it wait until a complaint from the individual themselves who filed the complaint in the first place?

Mr. SHANOR. I doubt, Mr. Martinez, that we would require additional action by individuals. In terms of how we would handle each case precisely, I think we would have to do that case by case.

Mr. MARTINEZ. Is there authority in any of the legislation to have you reopen those cases?

Mr. SHANOR. Well, the legislation does not absolutely explicitly say that we can reopen a case that has already been closed. And, indeed, as, I believe, Mr. Laufman testified, there are some potential difficulties, legal difficulties with doing that. We perceive no such legal difficulty with respect to a case which continues to be pending at the time the legislation is passed, if the cause of action is retroactively applicable.

Mr. MARTINEZ. In regards to the early retirement packages and benefits, do you think that there needs to be legislative language, or would report language do to clarify the intent of the bill is not to affect the early retirement plans and benefits?

Mr. SHANOR. Yes, we do. And we would be delighted to work with the committee if you would like our assistance in connection with such language.

Mr. MARTINEZ. Thank you.

Mr. Laufman, in your testimony you referred to a particular case in which the person's retirement was substantially less because of the lack of options, $158 versus $455 a month.

It seems to me that this is not an isolated situation. I have heard in my district repeatedly from older people who, rather than give them the high option, it seems like there is a concerted effort to give them the lowest option. I can only assume Simon Legre is at work in most of these instances, but people evidently do not understand what it costs to live. In the case of $158 a month, I do not now where in my area anybody could find any reasonable housing r $158 a month. What does it leave them to eat?

Mr. LAUFMAN. That is correct. In 1976, the Ohio Legislature changed the PERS disability plan to provide that no one would receive less than 30 percent. I think that the legislature, when they put that 30 percent floor in, was looking at the fact that people cannot afford to live on 10 percent of their salary which is the amount June Betts receives on regular retirement.

The age 60 limitation was put in back in 1933, at a time when people were normally retiring at age 60. They have tinkered with the law without looking at the impact on this growing group of people; that is, those people who start work for the first time in their 50s.

Mr. MARTINEZ. Yes, that is a subject of probably other legislation. But it seems to me that, because of the impact on this particular situation, that we ought to be looking at some of that, too.

Ms. SILBERMAN. Mr. Martinez, may I comment on that?

Mr. MARTINEZ. Yes. Ms. Silberman.

Ms. SILBERMAN. It seems to me, and I just thought about this this morning, in listening to Ms. Betts and Mr. Laufman, an element of sex discrimination is here as well. There is a class of women who, because of societal employment patterns, who entered the workforce at an older age, who are adversely affected. I think that H.R. 3200 does solve the problem with respect to age, but it is a problem that really has not come up in the sex discrimination context before, and I think is a serious one.

Mr. ROYBAL. The time of the gentlemen has expired. The Chair recognizes Mr. Gunderson, a member of the Committee on Education and Labor.

Mr. GUNDERSON. Thank you, Mr. Chairman. I have to tell you I do not think I am very educated on this particular issue. I have been spending some time trying to figure out exactly what the debate is and exactly what we are trying to do.

Correct me if I am wrong here. You all obviously understand this better than I do. We are really trying to say is that age can no longer be a consideration in pension and benefit and retirement programs and disability programs. Is that correct?

Mr. LAUFMAN. I would like to respond to that and say that that is not correct.

Mr. GUNDERSON. Okay.

Mr. LAUFMAN. The legislative history makes it very clear that age is allowed to be considered for those plans which cost more for the elderly. The reason that the exemption was put in was that Congress recognized that life insurance costs much more for someone who is 60 than someone who is 25. That is the reason for the equal cost/equal guideline which allows the employer to provide either $10,000 worth of life insurance, or to pay the same cost for the older worker as for the younger, even if it results less than $10,000 of life insurance for the older worker. That is the reason for the 4(f)(2) exemption to the act. So it does permit taking age into consideration.

What happened in the Betts case, is that PERS cut off disability benefits entirely. The EEOC regulations for long-term disability benefit provide a number of options. The employer can provide the same benefits for older workers as younger. It can provide benefits on an equal cost basis. Or it can pay disability benefits based on a fixed number of years. The EEOC regulations provide that an employer has the option, for someone who becomes disabled at age 61, of only providing full disability benefits for 5 years rather than go through the actuarial cost calculations of those benefits.

Mr. Gunderson. So what you are saying is what you want to do is you want to make all options available regardless of age, but you do not want age considered—by age can be considered as a factor in eligibility, or the amount of benefit?

Mr. Laufman. H.R. 3200 would reinstate the equal cost, equal benefit rule that the EEOC had been using for 20 years. It is not anything new. It is the same rule that has been applied for 20 years.

Mr. Shanor. That is correct, Mr. Gunderson, and I think I could put it a slightly different way that might help.

Mr. Gunderson. Put it in plain English, if you can.

Mr. Shanor. Well, I am not sure I can do that, because after all, I am a lawyer, Mr. Gunderson. What we think this bill does is it says if you make an age distinction in your benefit plan, that is a prima facie violation, and it is a violation of 4(a)(1) of the statute which makes age distinctions generally unlawful.

Mr. Gunderson. See, here is where I—you are helping me, but let me ask a question to try to clarify it. So if age distinction is a criteria, having then a benefit or pension plan based on 20 years plus being age 55, is that still legal?

Mr. Shanor. You mean being 20—

Mr. Gunderson. Under this bill if we said that you had to have 20 years of service.

Mr. Shanor. Right.

Mr. Gunderson. Plus be age 55, is that then a legal pension?

Mr. Shanor. That is legal, Mr. Gunderson, but it does appear as though it has a 4(a)(1) component to it. You then move on to the defenses under the statute. And there are two potentially relevant defenses. The employer can say it is cost justified; however, for a pension this defense would not be applicable. Or there is another provision you already have put into the law, Section 4(i), dealing with pension program, which makes that lawful.

Mr. Gunderson. Why would not cost justification be an element of defense?

Mr. Shanor. Well, with respect to pension programs, there is a special provision, 4(i), which deals with pensions. We are not really dealing with basic pension programs with 4(f)(2).

Ms. Silberman. And the reason that there is 4(i) is that pensions are tied to age. They have to do with length of service and they have historically had, even before mandatory retirement was outlawed, an age at which you could then get your pension. That is the way they worked.

Mr. Gunderson. You are saying nothing under this bill will change pensions?

Mr. Shanor. Nothing.

Mr. Gunderson. It will only change disability?

Ms. Silberman. No, it will change more than that.

Mr. Gunderson. What else will it change.

Ms. **Silberman**. But pensions are an exception.

Mr. **Gunderson**. Okay, what else will it change?

Mr. **Shanor**. Well, it will change other employee benefits that could run the gambit from things like severance pay plans that had an age limit to them, parking privileges mentioned earlier, and there is a case that hypothesizes some parking privileges involved, the Karlen case. Any other kind of benefit package. Say the employer says, you have got 5 days off per year with pay up until age 60, but thereafter, you do not. That would be a component protected by this bill.

Mr. **Roybal**. The gentleman's time has expired. The Chair recognizes Mr. Jontz.

Mr. **Jontz**. Thank you, Mr. Chairman. I do have one question that I would like to ask Ms. Silberman, if I could.

You talked about the Cipriano case in your statement and suggested that the District Court accepted the EEOC argument that this was a lawful program. Actually, did not the plaintiffs win in that case and did not the court even award them liquidated damages? And so how could it be a lawful program?

Ms. **Silberman**. I would like to turn that question over to my general counsel who argued that case.

Mr. **Shanor**. Mr. Jontz, the problem was that the two individuals, Sara Cipriano and June Miller, were excluded from the program. The program as an ongoing operation, however, gave each employee a 5-year window period in which to accept or decide not to accept the early retirement incentive. So, as to all employees who had a chance to take the voluntary early retirement incentive program, the program was lawful. As to those two individuals not grandmothered in, it was unlawful according to the court, and the EEOC's position.

Mr. **Jontz**. So why were there damages awarded?

Mr. **Shanor**. Damages were awarded because they were excluded. They never had an opportunity to voluntarily accept the early retirement incentive. They were cut out totally from ever having a chance to participate. Others had an opportunity, as they passed through the age bracket 55 to 60, to say, I would like to take this additional benefit not offered to anyone else. They did not have that chance. That is why they got damages.

Mr. **Jontz**. Thank you. I yield back the balance of my time, Mr. Chairman.

Mr. **Roybal**. Thank you. Mrs. Morella.

Mrs. **Morella**. Thank you, Mr. Chairman, for scheduling this joint hearing to review age discrimination and employee benefit plans in view of the recent Supreme Court decision and the Public Retirement System of Ohio v. Betts. I think it is important for our committees to review the impact of the decision on older Americans to see whether or not congressional intent was as the court had stated.

I have appreciated hearing the testimony of this first panel. And following you we are going to have another panel who are—many of the speakers are going to be talking against the legislation that has been proposed. So in order to give you an opportunity to respond to what you anticipate they are going to say, I would like to pose just a couple of the arguments that they will be presenting.

One has to do with the prohibition of legitimate age factors. Because the bill bars age discrimination and benefit programs, is it true that younger workers could become eligible to receive pensions once the retirement plan's non-age criteria, by that I mean the number of years, is met, which would then mean that if you refuse to give a 40-year old employee pension benefits solely because he or she is too young. Is that not age discrimination? What is the impact of this legislation on early retirement and on using age factors in some instances with regard to pension? Mr. Shanor.

Mr. SHANOR. Well, I will try, Ms. Morella. We do not believe that this legislation requires, for example, that an employer provide retirement benefits to a 40-year-old with 20 years service, the same as to a 55-year-old with 20 years service any more than the statute did before this legislation came forward.

While it might be that one could argue that there is prima facie age discrimination under 4(a)(1), Section 4(f)(2), which says you have to provide no lesser benefits for the older of two workers than for the younger of the two workers, would let you give more benefits to the older worker than for the younger worker. That is, the 55-year-old could get the retirement, but not the 40-year-old.

Moreover, there is a separate set of rules in Section 4(i), another exception to 4(a)(1), which lets pension programs carry on in the traditional way that you have alluded to in your question.

Mr. LAUFMAN. Could I add something?

Mrs. MORELLA. Yes, Mr. Laufman.

Mr. LAUFMAN. The courts have been unanimous in holding that it is permissible to provide greater benefits to older workers than to younger workers because the law is to protect the older worker. It would not be a violation of the ADEA to provide a 55-year-old greater benefits than to a 40-year-old.

Mrs. MORELLA. So you do not think this is going to open the flood gates for further litigation?

Ms. SILBERMAN. Particularly with respect to benefits, the normal retirement age, both from a regulatory standpoint and from a court standpoint, everyone has simply accepted it. It is part of the pension system that you have a normal retirement age even though no one can be forced to retire anymore by legislation.

Mrs. MORELLA. Would it have an adverse impact on early retirement? You know, many employers will encourage it and offer the incentives. Do you see that?

Ms. SILBERMAN. It is our position, Ms. Morella, that the legislation as written leaves too much open in terms of whether or not early retirement incentives can be offered.

I think it was helpful to me as a nonlawyer to have this explained to me this way. There is a range of early retirement incentives. There are those on one end of the range that everyone would agree are lawful, and that this legislation does not change. They are offered to everyone and there really is not much of an incentive involved.

At the other end of the spectrum, there are those that everyone would agree are not lawful. The vast middle are those that have been controversial before, and that we would like to ensure remain something that the courts will look at, because the very basis of an incentive, an early retirement incentive, is that you have to provide something to someone that will make him or her more liable to take it. And very often that has to do with age. Very often that has to do with younger people who, may cost more in terms of an incentive to have them take retirement voluntarily, and I keep emphasizing the word "voluntarily" because I think that is the important word.

The importance of this legislation really has to do with putting benefits back under the ADEA, back under, as general counsel put it, 4(a)(1) violation, The fact that some benefits will have a different defense because they have an age component, we think it is important to nail down. But the important principle of this bill has to be maintained.

Mr. LAUFMAN. Might I add something?

I have no problem if it is truly voluntarily. Now, in Karlen v. City College, the university provided continuing coverage of group insurance which covered life, health, dental and all of the other types of fringe benefits to somebody who would retire between age 55 and 64. But if they waited until they were past 65, there was no coverage. And what that did is it forced them to either chose retirement before they reached 65 or they would lose coverage if they retired at a later date. And at that point there is a question of how voluntary it is.

Mr. ROYBAL. Time has expired.

Mrs. MORELLA. Thank you.

Mr. ROYBAL. The Chair recognizes Mr. Hayes.

Mr. HAYES. Thank you, Mr. Chairman. Let me assure you I will not use up 5 minutes.

As a member of the Subcommittee on Labor and Management Relations, and a member of the full Committee on Education and Labor, I have one particular concern since the EEOC is represented here, as to what their specific position is. Do they support H.R. 3200 or not? Do they think it should be revised? If so, how? So we will know and have a sense of direction when it gets before the full committee. That is my purpose of wanting to be here to find out with this impressive list of witnesses. Certainly I want to leave here knowing just exactly what their position is.

Ms. SILBERMAN. Well, Mr. Hayes, our position, I hope, is quite clear that we support the bill, that we support the bill with the important caveat that early retirement incentives be protected in the bill to the extent that they fulfill the purposes of the act. Passage of the bill will be of enormous importance to our enforcement efforts.

Mr. HAYES. Will you happen to do some lobbying along with us, if that is permissible, if you support it?

Ms. SILBERMAN. Why, Mr. Hayes, I am always prepared to work with you in any way that will be mutually beneficial and that will help American workers.

Mr. HAYES. Thank you, Mr. Chairman.

Mr. ROYBAL. Thank you, Mr. Hayes. The Chair would like to place in the record the opening statement of Congressman Rinaldo. That statement will appear in the record before the questioning of the witnesses. And that would include also Mrs. Slaughter and any other member of the committee that may have an opening statement in writing to submit at this time.

The Chair will now recognize Mr. Ballenger.

Mr. **Ballenger**. Thank you, Mr. Chairman. I am sorry I am late, and missed your previous discussions and so forth.

Mr. Shanor, I am probably the only member of this panel and probably one of the few Members of Congress that has been in court with you all. I recognize that you all have an unlimited supply of lawyers and most of us business people do not. I also recognize the fact that a complaint brought by an employee to you all does not necessarily go to court. We end up in hearings with you all.

It seems to me it cost me close to $30,000 to fire a person who refused to work, and immediately went to EEOC's office. And it took 3 years, and you kept offering me over and over again, if I promised to be a good boy and put it on my bulletin board that I would never do it again, that you would let the whole thing go away. And I did not, and eventually your office said, well, forget it. What I am wondering is, do your current regulations permit employers to structure a benefits package that combines retirement and pension?

Basically, what I have been trying to preach in Congress is the idea of a cafeteria plan where a younger worker wants something different than an older worker. But with the regulation that appears to be coming with this bill, you are going to have to offer everybody the same thing. It appears that mandated benefits is the way our Congress is going, and I do not know whether you consider H.R. 3200 another one of these mandated benefits.

But do you think that this particular regulation and the studies on the issue indicate that the government wants to tell private businesses what to pay their employees regardless of their age?

Mr. **Shanor**. Well, I, for one, would certainly hope that is not the case, Congressman.

Mr. **Ballenger**. Me, too.

Mr. **Shanor**. In responding to your specific question about cafeteria plans, I do not believe that there is anything in the statute, in this bill, or in our interpretations which prohibits an employer from providing a cafeteria plan equally available to all employees where the employee picks the items he or she desires from that cafeteria. If it is a wholly voluntary choice of the employee and everyone is given the same cafeteria selection, where is the age discrimination?

Mr. **Ballenger**. I was just thinking if the youthful—

Mr. **Shanor**. There may be some pension problems. There are a lot of regulations on pensions.

Mr. **Ballenger**. Right.

Mr. **Shanor**. But with that caveat.

Mr. **Ballenger**. That is the one I was thinking of, and is that not what H.R. 3200 applies to, pension plans? No? Is it just pure—I see you shaking your head.

Ms. **Silberman**. No.

Mr. **Shanor**. There is a specific provision already in the law, Section 4(i), which says that where 4(i) applies, that is to pension plans, the other exceptions, including 4(f)(2), do not apply.

Mr. **Ballenger**. Well, not being a lawyer I will have to take your word for that.

Ms. **Silberman**. Mr. Ballenger, may I say something.

Mr. **Ballenger**. Yes, ma'am.

Ms. **Silberman**. I would like to make it very clear on the record that we do not have an unlimited supply of lawyers, and thanks to the Congress we have many fewer than we need.

Mr. **Ballenger**. I would like to thank Congress for that.

Thank you, Mr. Chairman.

Mr. **Roybal**. The Chair will now recognize Mr. Ford. Mr. Ford has left.

The Chair will recognize Mr. Hughes.

Mr. **Hughes**. Thank you very much, Mr. Chairman. I, too, want to welcome the panel this morning.

Some of the witnesses on the next panel will be suggesting that the invalidated EEOC guidelines require an employer to ignore the value of the pension benefit in determining the amount of an employee's severance benefit. They also suggest that, by passing the legislation before us we will be, in essence, tampering with the collective bargaining process, because part of the tradeoff in negotiating contracts is to determine just what benefits will accrue to older Americans and to younger Americans in the employment process.

What is your reaction to those suggestions? Will we, in effect, be tampering with the collective bargaining process? And in fact, did the invalidated EEOC guidelines require an employer to ignore the value of the pension benefit in determining severance benefits?

Mr. **Shanor**. Well, let me start, Mr. Hughes, I guess, with the part of your question about tampering with the collective bargaining process. Any statute, Title VII, the ADEA, the Americans with Disabilities Act, any statute which grants individual rights does limit the total flexibility of employers and unions to collectively bargain for what they wish to do. That is simply a fact of life. The question is: Is it important enough to guarantee the individual rights of individual employees to place those restrictions on labor and management to collectively bargain to wherever they wish to go? And so you have to make that policy choice in connection with this specific legislation as well as any other civil rights legislation.

With respect to the issue of pensions and severance, it is true that the EEOC's Interpretive Bulletin prohibits the combining of welfare benefits such as severance pay with pension benefits. Now, that is not without precedent elsewhere in the law, including under ERISA and including the fact that pensions are much more heavily regulated elsewhere than are things like severance pay. If you decide as a policy matter that you believe that those ought to be combined, then that is your policy decision.

Mr. **Hughes**. So you do not dispute the characterization by witnesses on the next panel, but you submit that it is a policy decision as to whether we want to protect individuals from themselves, so to speak, and the collective bargaining process in determining whether they want to opt for early retirement based upon a calculation on the worth of their pension benefit equity at that particular time.

Ms. **Silberman**. We have testified, Mr. Hughes, that we do not believe that early retirement was contemplated under our Interpretive Bulletin. Therefore, if we are bringing the law back to the status quo, to the pre-Betts position, then early retirement incentives will not be covered and we would like to have language.

Mr. HUGHES. Let me ask you a question. As a matter of policy, what is so wrong with an individual deciding that at the age of 59 they would like to opt for early retirement, and take additional benefits offered by an employer at that particular time?

Ms. SILBERMAN. Oh, Mr. Hughes, I see nothing wrong with it. I have been one of the great proponents of early retirement incentives. And I would urge the Congress, in whatever you do, to remember that we are talking about benefits. Benefits is something that makes someone better off, and you should do nothing that will make it less likely for people to be able to opt for something that is going to make them better off.

Mr. HUGHES. But it is suggested by at least one of the witnesses that will follow this that the invalidated EEOC guidelines, which we are attempting to codify, require an employer to ignore the value of the pension benefit in determining the amount of the employee's severance benefit.

Ms. SILBERMAN. Well, severance and early retirement incentives are two different pots of money, and they are subject to two different pieces of regulation. And I think it is arguable—the point can be well taken that it ought to be all in one bundle or it ought not to be all in one bundle, and that is something that you all are going to have to decide.

Mr. HUGHES. How do you differentiate between severance and early retirement?

Ms. SILBERMAN. Severance is something that has not been earned. Early retirement is something that—

Mr. HUGHES. That is how you would define it.

Mr. SHANOR. Part of it is vesting. A number of courts have said they are simply designed to address two different purposes. Severance for very short-term employee carryover until they find a job. Pension, very long-term vested benefits. Now, there are a number of cases which, if you would like, we can certainly provide you that discuss those issues.

Mr. HUGHES. We are talking about areas where there has not been vesting of rights as such.

Ms. SILBERMAN. With severance, yes.

Mr. HUGHES. Yes, with severance.

Mr. ROYBAL. The gentleman's time has expired.

Mr. HUGHES. Thank you, Mr. Chairman.

Mr. ROYBAL. The Chair recognizes Mr. Owens, who is a member of the Committee on Education and Labor.

Mr. OWENS. I have no questions, Mr. Chairman.

Mr. ROYBAL. Thank you, sir.

Ms. Schneider is now recognized.

Ms. SCHNEIDER. I have no questions at this time.

Mr. ROYBAL. I do have some questions.

I would like to clarify, particularly with the attorneys, this situation. It seems to me that each one of you argued that the enactment of H.R. 3200 would benefit or remedy the situation that June Betts and a number of other older workers find themselves in.

It is also my understanding that a presentation will be made that will be critical of H.R. 3200. My questions are, does H.R. 3200 maintain early retirement?. And then, does it put into law the EEOC regulations?. Those are the two things I would be interested in clarifying. Now, Mr. Shanor, what is the answer to these two questions?

Mr. **Shanor**. I will try, Mr. Roybal, to answer them as straight forwardly as I can.

With respect to early retirement incentives, some are clearly permissible with or without this bill. For example, flat lump sum incentives are permissible. Lowering the age at which actuarially unreduced benefits are available under pension plan, that is permissible. Those are the two most common sorts of early retirement incentive programs that now exist in the American economy. Providing extra age and service credits to younger workers to let them retire early, like adding 5 years to a person's service credit, or to their age—that is permissible with or without this bill.

Providing an incentive which meets the equal costs for equal benefits rule, that is permissible under the law as it stands after Betts. It is also permissible under this legislation without amendment. The problem that we see is that incentives available to all employees for some portion of their work lives, where there is a legitimate reason for having that, seem to be made unlawful by this legislation. And we think that problem ought to be taken care of. In other words, it is a subclass of all early retirement incentives that this bill might knock out.

Mr. **Roybal**. All right. Now, how can that be corrected? Would you be able to provide suggested language or whatever is needed to correct the situation?

Mr. **Shanor**. Yes, Mr. Roybal, and to work with your committee staffers on this project. We will begin as soon as you would like us to.

Mr. **Roybal**. I would appreciate it if you would, and then submit to the committee within a period of the next 2 weeks any recommendation that you may have with regard to this subject matter.

Mr. Laufman, what do you think should be done to this bill, if anything, that would make it better?

Mr. **Laufman**. I am perfectly happy with the way the bill stands. What I am concerned about with regards to some of the early retirement proposals that are being made is it may then start getting into the area of forced retirement which the 1978 amendment made illegal. I think that most workers, or at least many workers would love to have an opportunity to retire early with enough benefits that they can live comfortably. I have no problems with voluntary retirement. My concern would be that employers might provide lower benefits to older workers to force them into retirement.

Mr. **Roybal**. We can assume, then, that H.R. 3200 is headed in the right direction? It is not perfect. But we hope that by the time the Education and Labor committee takes it up, we will have some additional language submitted so it can be drafted in a way that can be as perfect as it is possible for legislation to be written.

Now, let us take the other side. If some legislation, whether it is this bill or any similar bill, does not become law, what will be the impact on those older workers who find themselves in the same situation as Ms. June Betts? Will we have individuals in the same situation as June Betts all over the country?

Ms. Silberman. I think it is clear that, after listening to the testimony this morning, that there will be people who will be unprotected and that, yes, we will have people all over the country that will not be getting benefits that they should be getting. As I testified, Mr. Roybal, we think that the legislation is enormously important, and we would look forward to working with the committee to doing the things to the bill that need to be done in order to make it not only acceptable, but that we will be able to support it wholeheartedly.

Mr. Roybal. One of the things that was of interest to me was actually stated by Ms. Betts, in that she said something to the effect that if her mother had been 59 years of age instead of 61 when she totally became disabled, that she would have been entitled to more than twice the amount of monthly retirement benefits.

Ms. Betts. That is correct.

Mr. Roybal. Would you please comment on that, Ms. Betts.

Ms. Betts. That is correct. And actually she was partially disabled at 59, which is evidenced by the fact that she was demoted in her job because she could not perform it. But if she had been 59 when she put in for disability, she would have been eligible for $350 a month in benefits, which would have been disability retirement. She was forced to take regular retirement early. Because she was not vested in the plan, she had only worked for a period of 5 years or something like that, she was not entitled to the full amount of retirement that she would have been had she worked until she was 65, and could take the full amount. So that is what caused the difference in the benefits.

Mr. Roybal. Was the difference in money then, due to the fact that she was 61 years old?

Ms. Betts. If she had been 59, she would have been entitled to disability retirement, which would have been equal to the same amount as her full retirement.

Mr. Roybal. Had she been 59 years old and under the same circumstances.

Ms. Betts. She would have gotten $350 a month.

Mr. Roybal. All right. Which is how much more than she got when she was 61?

Ms. Betts. It is more than double. It was $158 versus $350.

Mr. Roybal. All right. So it is clearly a situation—

Ms. Silberman. It is discrimination, and, Mr. Roybal, this is why we believe that language "no less than" is so crucial.

Mr. Roybal. All right. Then we would appreciate very much your submitting any proper language.

Now, that is something we want to clarify because this matter of age discrimination is sometimes not believed by many people. Now, I have one question I would like to ask Mr. Laufman. I would like to understand the procedure with regard to the final adjudication in this case. You won the case in the District Court?

Mr. Laufman. We won in the District Court. We won in the Sixth Circuit. We lost in the Supreme Court. The Supreme Court then remanded it to the Sixth Circuit.

Mr. Roybal. All right. But the actual decision was made by the Supreme Court?

Mr. Laufman. It was made by the Supreme Court.

Mr. ROYBAL. Even though it was remanded to another court, it was made by the Supreme Court?

Mr. LAUFMAN. It was made by the Supreme Court.

Mr. ROYBAL. All right.

Mr. LAUFMAN. The Supreme Court did not rule on the forced retirement issue, and that is the reason it got remanded.

Mr. ROYBAL. Oh, I see. So there was another issue that—

Mr. LAUFMAN. That we won in the District Court. The Sixth Circuit did not rule on forced retirement. The Sixth Circuit ruled on the equal pay/equal benefit rule and ignored the forced retirement issue. It is now back in the Sixth Circuit for that issue.

Mr. ROYBAL. Well, I can see the tremendous problem that we have in this country if something is not done about proper legislation directed to remedy the situation.

Now, it is my understanding that we will be having a roll call pretty soon, so I am going to ask if there is any member of the committee that may have some questions to ask at this time, and the Chair will recognize them in the order in which they seek—Mr. Martinez.

Mr. MARTINEZ. Yes. Mr. Chairman. I think it has to be reiterated and it has to be done in strong language. I think that many of the committee members, and both from my subcommittee and the Select Committee on Aging, have talked about, and because I think that the business community is going to keep hitting on that point over and over again; the point of the jeopardy of early retirement plans.

Let me make it very clear that we understand the concern expressed, and we intend to, as we hear it in our committee and mark it up, to clarify the matter and to receive recommendations on the language. We do not intend to go beyond restoring what was before the Betts decision. Thank you, Mr. Chairman.

Mr. ROYBAL. Mr. Gunderson.

Mr. GUNDERSON. Thank you, Mr. Chairman. I guess one of the reasons some of us get frustrated with lawyers is I thought you had all told me this did not affect pensions. And then Connie Morella asked questions about early retirement, and you all indicate how this is going to impact on early retirement, which certainly I consider a part of a pension program. So you can begin to see the frustration we have up here.

Let me try to go on, however. and page 3 of the bill, line 18 says that the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker. Can it be more? It just can't be less?

Mr. SHANOR. Yes.

Mr. GUNDERSON. So, in other words, we can discriminate on behalf of older workers. We just can't discriminate on behalf of younger workers in this particular legislation.

Mr. SHANOR. That is correct.

Ms. SILBERMAN. That has always been the case.

Mr. GUNDERSON. Well, as a younger guy I have got mixed emotions about that on.

Mr. SHANOR. Mr. Gunderson.

Ms. SILBERMAN. If it please God, you will get old, Mr. Gunderson.

Mr. SHANOR. I also want to say that even as a lawyer I fully appreciate your first comment. The problem is, as I understand it, Section 4(i) addresses pensions. There is ambiguity as to whether it addresses early retirement incentive programs, because of the way 4(i) was written in earlier legislation. That is why we think pensions are not at issue here, but early retirement incentives are.

Mr. GUNDERSON. One of the reasons I am cautious about this legislation is we have just been through something called Section 89. And if you are at all familiar with Section 89, which we are about to repeal, we have said that, look, benefit plans can be discriminatory based on the unique needs of different people within that company. In other words, a family-owned company can have a little bit better, should we say, life insurance or health insurance package for the owner than it does for the employee. Now, is this going to be the son of Section 89?

Mr. SHANOR. No, Mr. Gunderson, this is to restore what the vast majority of American employers are already comfortable with, already have plans to deal with. At EEOC we receive charges. Vice Chairman Silberman said—

Mr. GUNDERSON. Let me give you a specific example.

Mr. SHANOR. Yes.

Mr. GUNDERSON. If I own a company as a young entrepreneur, and all of my employees happen to be older than I am, but I have a health and life insurance package to protect my investment for my family, could not any of those employees then file under this legislation that was discriminatory based on age in that we only gave that health insurance to the young people?

Mr. SHANOR. If it is not because of your age, but because of your ownership of the company that you have that special benefit, that may be a Section 89 problem. It is not an ADEA problem.

Mr. GUNDERSON. How would we prove that?

Ms. SILBERMAN. It is what we call a reasonable factor other than age. And generally these reasonable factors other than age have an age component to it. But what makes you do that is the fact that you are the owner.

Mr. GUNDERSON. Okay, let me now go into a serviceman who is receiving veterans disability. Under Federal law, when he reaches a certain age, he must go from veterans disability to veterans retirement. Let's assume that veterans retirement happens to be less dollars than his veterans disability was because of the years that he was in the service were a small number. Will this legislation void that provision of Federal law?

Mr. SHANOR. I do not believe it voids any other Federal law provision. It would void a contrary State law provision.

Mr. GUNDERSON. So we are going to impose this on States and on private sector, but we are not going to impose it on the Federal Government.

Mr. SHANOR. The general rules are imposed on the Federal Government. But if you have a specific Federal statute on a specific point, it is my understanding that that statute would prevail.

Mr. GUNDERSON. Well, should we not include Federal pension transfers to, or Federal disability to pension plans as well?

Mr. SHANOR. I am not saying you should or you should not. But this bill does not, as I understand it, do that. This bill is to simply take care of Betts; not to change all the other things that were in the picture before Betts and remain in the picture after Betts.

Mr. **GUNDERSON**. If we provided an amendment to this bill which said that these provisions shall be in effect except where such provisions have been agreed upon and ratified in a collective bargaining agreement, would you support or oppose that amendment?

Mr. **SHANOR**. I cannot speak for the administration on that. I think that is inconsistent with the general individual rights approach of the ADEA, Title VII and other civil rights legislation. That is a policy question that I am not prepared to answer for you today.

Mr. **ROYBAL**. The gentleman's time has expired.

Mr. **GUNDERSON**. Mr. Chairman, I do ask unanimous consent that a series of questions can be submitted to these witnesses, and that their written responses can be a part of this record.

Mr. **ROYBAL**. All right. Without objection, it will be the order. The Chair recognizes Mr. Hughes.

Mr. **HUGHES**. No questions.

Mr. **ROYBAL**. Ms. Bentley?

Ms. **BENTLEY**. Mr. Chairman, I would ask unanimous consent to be able to submit some written questions and to allow the questions and answers to be part of the record, as well.

Mr. **ROYBAL**. All right. Ms. Bentley has asked and has consent that her questions in writing be submitted to the witnesses to be answered within the next 2 weeks. Without objection, that will be the order. Mr. Petri?

Mr. **PETRI**. No questions. Thank you, Mr. Chairman.

Mr. **ROYBAL**. All right. If any member of the panel or the committee has any questions, these questions can be submitted in writing, and we will ask the witnesses to respond to those questions within 2 weeks.

I would like to thank the members of the first panel for their interesting testimony. I have other questions that I would also like to submit. I am going to confine my questions to just two of them, and I hope the others do likewise.

Ms. **SILBERMAN**. Thank you.

Mr. **ROYBAL**. The Chair will now hear from the other witnesses. Will you please come forward and take your respective seats?

Mr. **MARTINEZ**. While we are getting settled in, let me announce the members of the next panel. Karin Clauss, Professor of Law, University of Wisconsin, Law School, Madison, Wisconsin; Mr. Mark Dichter, Attorney, Morgan, Lewis & Bockius, Washington, D.C.; Mr. Chris Mackaronis, Attorney, Bell, Boyd & Lloyd, Washington, D.C.; Mr. Scott Macey, Executive Vice President, Actuarial Sciences Associates, Incorporated, Piscataway, New Jersey; and Ms. Ellen Fredel, Attorney, Saw, Pittman, Potts & Trowbridge, Washington, D.C.; Mr. Frank Rumak of Buck Consultants, Incorporated, New York, New York; and Mr. Burton Fretz, the Executive Director of National Senior Citizens Law Center, Washington, D.C.

And with that, we will begin with Ms. Karin Clauss.

STATEMENT OF KAREN CLAUSS, PROFESSOR OF LAW, UNIVERSITY OF WISCONSIN

Ms. CLAUSS. Thank you very much for giving me this opportunity to testify in support of H.R. 3200, to restore to older workers the protections against employment discrimination that had been recognized by the courts and agencies until the Supreme Court's decision last term.

Although I am currently a professor of law at the University of Wisconsin Law School, I was formerly a solicitor of labor in the Carter Administration. And before that, for the period from 1972 to 1977, I was in charge of the legal division that was responsible for the Age Discrimination Employment Act. And for the period from 1968 to 1971, when we first had responsibility for the act, I supervised the litigation brought under that statute. I am therefore intimately familiar with and indeed directly responsible for the Department of Labor's interpretation and enforcement of the ADEA from 1969 until its transfer to the EEOC in 1979.

With the committee's indulgence, I was contacted just as I was leaving for Minneapolis and did not get back to my office until Monday night. So although I have now prepared my testimony, I did not have it typed and xeroxed, and I would hope that I could submit my written testimony for the record after this hearing.

Mr. ROYBAL. Without objection, so will be the order.

Ms. Clauss. Thank you. The Supreme Court's decision in Betts stands the usual cannons of statutory construction that have governed the court's interpretation of legislation since the New Deal, on their head. Under these recognized cannons of statutory construction, social legislation is broadly construed to achieve the objectives of Congress. And exceptions to that legislation are narrowly interpreted and confined to situations within the spirit of the exception.

What the court has done here is to instead impose a very narrow, strained construction of the general coverage language, the prohibition language, and given the terms of compensation and terms of condition of employment as used in 4(a)(1) of the Age Act a completely different meaning from the same language used in 703(a)(1) of the Civil Rights Act, even though Congress made it very clear that they intended by the Age Act to extend the same benefits that had been extended to blacks and women under Title VII.

Secondly, the interpretation of 4(a)(1) to exclude all benefit, fringe benefit programs, renders meaningless the language in Section 4(f)(2) since if benefit plans were not intended to be included in 4(a)(1), there would be no necessity to exempt them under 4(f)(2). The kind of pretextual behavior that the court said would still be reached by 4(f)(2) could just as clearly have been prohibited by 4(a)(1) as it is under Title VII.

Moreover, if Congress had never intended 4(a)(1) to include employee benefit plans, this Congress' addition of 4(i) makes no sense at all. 4(i) prohibits employers from ceasing accrual of benefits under a pension plan because of age. If, as the court found, no employer ever had to include people in pension plans because of age, 4(i) would have been unnecessary. The court's opinion also violates the textual structure of the act. Thus, Justice Kennedy says that

Section 4(f)(2) is not a defense, but is a description of the type of conduct that is prohibited by the Age Act. But if you look at the Senate report, the 1967 report summarizing the provisions of the Age Act, 4(a)(1) was listed under a caption entitled "Prohibition of Age Discrimination", and 4(f)(2) was listed under a caption entitled "Exceptions to the Aforementioned Unlawful Practices".

I want to skip to some of the more important points. Let me also point out a point that has been made earlier that, as 4(f)(2) was construed by Justice Kennedy, it does not deal with the real problem. Although Justice Kennedy speculates that maybe an employer would adopt a discriminatory benefit plan, which would be perfectly legal, in order to achieve illegal objectives, i.e., to encourage someone to quit or not to apply for employment, we do not know of any such pension plan.

In 10 years of supervising the program and having read literally tens of hundreds of litigation files and requests for opinion letters, no one ever suggested that there are any such plans out there. But they are out there, we know they are out there, many employee benefit plans, many fringe benefit programs that exclude older workers for no reason other than age. As the previous witnesses have indicated, both the lower courts and the agencies in charge with enforcement have recognized that those exclusions of older workers are legitimate, are justified by 4(f)(2) if they are based on cost.

But we saw programs, for example, that excluded older workers from paid sick leave for no reason other than they were 50 years of age. Previous witnesses have testified about programs that exclude older workers from severance benefits. And although they suggest this actually works to the advantage of older workers, that was not our experience. What they are suggesting is if an older worker is in a plant that shuts down at age 55 and he is eligible for reduced pension benefits, he should be required to take those reduced pension benefits in order to sustain himself until he can get another job even though it will reduce his pension for life. Whereas a younger worker, who has many less years invested, can take a severance pay in order to look for other employment, and does not have to touch the pension benefits which they can then claim when they reach retirement age, and can obtain without any reduction at all.

So clearly, under all of those severance pay plans that we saw, the older worker was severely disadvantaged to benefit the younger worker. And having just said that, let me respond to some of the questions about cannot we leave this to collective bargaining.

The whole thesis behind Title VII and the Age Act and the Equal Pay Act is that collective bargaining has not been an adequate instrument for protecting the rights of minority workers. And that if these minority workers are to be fully received into the work force and provided with the same benefits and privileges as the majority worker, then that has to be done by Congress. And Congress had done that in the Age Act. With respect to the arguments of legislative intent, I spend some time on that in my written testimony. I do not think Congress really needs my assistance in construing what their original intent was, so I leave that to my written comments. But I would like to address three points that have no ously been touched upon.

One, in the letters addressed by various members of the business community to Congressman Roybal in a letter dated August 31, 1989, these groups argue that at the very minimum 3200 should be changed to remove the retroactive application provision. And I want to make very clear that there is nothing unfair or unconstitutional in making H.R. 3200 retroactive. That issue was settled by the Supreme Court in the Turner Elkhorn Coal case which upheld the retroactive application of black lung benefits to former workers.

And perhaps even more directly in point was the Portal to Portal Act enacted in 1947, which retroactively extinguished billions of dollars in unpaid wages, which the Supreme Court had held were due employees based on the failure of employers to pay in accordance with the Fair Labor Standards Act. And indeed, in that case, Congress, in overruling the court decision, did not even have the support of the agency charged with enforcement. So employees were under no notice that they would lose this right that the court had given them. And this case, of course, the enforcement agencies have from the act's inception taken the position that 4(a)(1) protects workers from being denied fringe benefits because of age, and that 4(f)(2) exempts from that protection only those fringe benefits whose costs would increase because of the age of the worker. So industry and the employers have been on notice for over 20 years that they are expected to provide fringe benefits without discrimination based on age, race or sex.

The second point made by the business representatives is that these regulations of the Department of Labor and EEOC spanning 21 years are not entitled to any particular weight, because they are simply guidelines. They are simply Interpretive Bulletins. And I would respond to that twofold: One, Congress, in the 1978 amendments, specifically directed the Department of Labor to prepare the regulations which currently have been adopted by the EEOC in order to deal with the problems raised by raising the retirement age from 65 to 70. Congress recognized that this would have an impact on existing disability plans, reflecting their intent and knowledge that such disability plans were covered by 4(a)(1), and directed the department to come up with regulations that would explain clearly to business what their obligations under the law with respect to those plans would be. Secondly, these regulations have the unique imprimatur of this Congress. carefully reviewed those regulations, and where they disagreed added Sections 4(g) and 4(i) to the act. The fact that they limited their "correction" of the department's and EEOC's regulations to those two specific provisions I think fairly reflects their view that the rest of the regulations properly interpreted congressional intent.

And, thirdly, a major part of the court's justification for its holding in the Betts case and for the business community's suggestion before these committees that 3200 should not be made retroactive is a false and misleading statement that the Department of Labor waited 12 years after the enactment of the ADEA in 1967, before stating that the only kinds of plans that were entitled to exemption under 4(f)(2) were those which increased in cost with age.

Now, I think that the department's position on this is clear from reading the regulations. I happen to agree with Justice Marshall that it takes a strained and peculiar reading to find that the 1969 regulations do not address this question specifically. But even if you share Justice Kennedy's doubt as to what that language meant, in public domain documents issued after the regulations were promulgated in 1969, in opinion letters that were published in the public domain, in litigation that was brought by the department, the Department of Labor made its position unequivocally clear, and they base this not on the subterfuge language as Justice Kennedy suggests, but on the language in the statute that "plans such as" retirement plans, i.e., plans whose cost increase with age.

Now, unfortunately, the University of Wisconsin Library does not keep opinion letters going back prior to 1979. So I can only document this with legal briefs that were filed in court during the early 1970s. But in the Taft Broadcasting case, which was the first case to deal with the 4(f)(2) exemption, the Department of Labor, in documents filed with the court, said as follows, and I'm quoting. "Section 4(f)(2) does not apply to every employee benefit plan," which is what the court concludes, "but only to those such as a retirement pension or insurance plan significantly," addressing direct point one of Justice Kennedy's mistaken views, "significantly profit sharing plans," said the department, "are not mentioned. And in view of the limiting phrase 'such as', the statutory language in Section 4(f)(2) cannot be stretched to include them."

The secretary's documents go on to say that nothing in 4(f)(2) justifies excluding workers from the profit sharing plan here involved since its cost is not in any way geared to the age of participating employees. So this has been a long standing and consistent interpretation of the agency charged with enforcement.

Lastly, let me say that in the drafting of the 1979 regulations, when the Department of Labor worked very closely with EEOC and with the business community, there was not a single comment from the employer community that suggested these regulations were invalid because 4(a)(1) did not protect employee benefit plans. The thrust of the critical comments was addressed to alleged inflexibility in permitting employers to adjust benefits in some package approach rather than a benefit-by-benefit approach, and that prohibited the movement from disability to retirement.

The Department of Labor's final regulations addressed those concerns, and wrote into the regulation flexibility that has been followed by the EEOC. But there was never any suggestion, and I am emphasizing this point and the department's long-standing position to make the point that was made by Representative Martinez that we are not hoeing new ground here. We are not opening up the flood gates. This is not a parade of horribles. You are doing in 3200 what you did back in 1967. This does not plow new ground. It simply restores the rights that were already there.

There has been a lot of concern expressed about age limits in pension plans. As the general counsel for EEOC properly noted, nothing in the Age Act has ever been construed or been claimed to invalidate provision of benefits which require a particular age to qualify for them, nor is there anything that prohibits employers from excluding older workers once the cost becomes prohibitive.

What we are talking about is prohibiting the exclusion of older workers where there is no additional cost and where you are going to give the benefits that should be shared by all workers to younger workers at the expense of older workers. That is what we are talking about, and I hope that Congress will adopt 3200 as drafted.

Mr. **Martinez**. Thank you, Ms. Clauss. Mr. Dichter.

STATEMENT OF MARK S. DICHTER, ATTORNEY AT LAW, MORGAN, LEWIS & BOCKIUS, PHILADELPHIA, PA

Mr. **Dichter**. Thank you very much, Chairman Martinez, Chairman Roybal, members of the committee. My name is Mark Dichter. I am a partner in the law firm of Morgan, Lewis & Bockius in Philadelphia. I am the former cochair of the ABA Labor and Employment Law Section's Committee on Equal Employment Opportunity Law. I am here today representing the Association of Private Pension and Welfare Plans, the ERISA Industry Committee, the U.S. Chamber of Commerce and the National Association of Manufacturers.

I very much appreciate the opportunity to testify here today on H.R. 3200. I have submitted a written statement which I will not, of course, cover in detail, but merely summarize today, and then be available to answer any questions.

Mr. **Martinez**. Your written testimony will be included in the record in its entirety.

Mr. **Dichter**. Thank you very much. In terms of potential impact, there are three areas that we have focused on with respect to H.R. 3200. One deals with the question of coordination of benefits. The second deals with voluntary early retirement programs. And the third deals with its more generalized impact on the use of actuarial assumptions with respect to pension and other plans which have age-related factors.

First, let me focus on the question of coordination of benefits. Here we are talking about, as was pointed out by some of the earlier questions, examples of where an employer may seek to integrate the provision of benefits to provide income steams, such as disability benefits integrated with pension benefits, and severance benefits integrated with pension benefits. Contrary to the statement of General Counsel Shanor, in fact ERISA does not prohibit, but specifically recognizes the integration of welfare and pension plans. The report of the House Ways and means Committee on ERISA noted that, "Many present plans are fully or partially integrated . . . and elimination of the integration procedures could substantially increase the cost of financing private plans. Employees, as a whole, might be injured rather than aided if such cost increases resulted in slowing down the growth, or perhaps even eliminating private retirement plans."

The Supreme Court, in a unanimous decision written by Justice Marshall in 1981, in Alessi v. Raybestos Manhattan, noted that "Integration of benefits promotes the provision of benefits and the sound funding of pension plans."

One of the questions asked by Representative Gunderson had to do with Federal employees, and I think that provides an excellent example of the issue here. In the same year that Congress extended the ADEA to Federal employees, 1974, Congress itself also expressly prohibited the payment of both severance benefits and pension benefits to certain classes of Federal employees. So Congress, when it was acting on behalf of the U.S. government as an employer, recognized the concept of integration of benefits even though at the same time they amended the Age Discrimination Act to apply to Federal employees.

I will not spend very much time with respect to the question of early retirement incentive plans, because it appears that the EEOC itself recognizes that this is a concern, and that H.R. 3200 as drafted presents a problem. But this also presents another example of the difficulty of blindly applying the concept of age discrimination to benefit plans.

As Vice Chairman Silberman said, it may be very appropriate to provide greater incentives to younger workers when we are talking about voluntary retirement plans. You start from the generally accepted concept that a voluntary retirement plan is a benefit, partly because it is voluntary. Then you take the next step which is, as Vice Chairman Silberman said, that it may be perfectly appropriate and should be lawful to provide a greater incentive, i.e., a greater benefit, for younger workers when you are structuring a voluntary retirement plan. That is just one example of the fact that there may need to be age-based differences in various forms of retirement plans. Therefore, I think there is agreement on this point, that the bill needs to be amended to make clear that voluntary retirement plans would be protected.

The third area deals with the use of actuarial assumptions, and that is probably the most conceptually difficult area with which to deal. One of the questions asked of General Counsel Shanor dealt with the question of minimum age for retirement, and whether this violated 4(a)(1) of the Age Act, because it had an age-specific requirement.

I believe Mr. Shanor's answer was that 4(a)(1) was violated by requiring a minimum age for retirement like 55, but he said that the minimum age is permitted by 4(i) . . . where Congress dealt with that specifically. However, Congress did not pass 4(i) until 1986. So, if you took Mr. Shanor's view, then the Age Act would have prohibited minimum ages for retirement between its passage in 1967 and 1986, when 4(i) was added to the law.

What was recognized when Congress passed the ADEA, just as it must be today, is the acceptance of the use of actuarial tables. Because of that, the Age Act is different than Title VII. There actually exist actuarial tables based on sex. If you go to buy life insurance privately, it might very well be based on the life expectancy of women versus men. Under Title VII, we accept the fact that you cannot vary life insurance benefits based on sex.

However, we do accept the fact that you can vary life insurance benefits under the Age Act. I think this is generally accepted, even though it is based on generalizations about life expectancy based on age. That does not mean one person who is 55 is more likely to die next year than another person who is 23. We use a generalizations. The kinds of generalizations which the Title VII precludes we recognize are totally appropriate under the Age Act.

When one suggests that the answer may be benefit cost analysis, the problem is the difficulty in establishing those costs. If we all agreed on the concept, then we might not have the problem. But a good example of the problem is the case of EEOC vs. Mt. Lebanon where the EEOC argued that an employer in that case, a State employer, could not rely on the rates charged by the insurance company or suggested by the insurance company as the benefit cost, but had to go behind those rates to show somehow that the rates were justified. This goes far beyond, I think, anything that was ever intended. I think this suggests quite clearly that the complexity of dealing with employee benefits under the Age Act is one that cannot simply be done or dealt with H.R. 3200.

As pointed out earlier, legislation which on its surface sounds like a good idea because it appears to promote fairness, like Section 89, may have insurmountable difficulties when it comes to its application. And you have the same problem here in dealing with employee benefits under the Age Act. I think the simple conclusion is that H.R. 3200 will adversely affect all employees and may very well affect most adversely the older workers who it is designed to protect.

I would be pleased to answer any questions. Thank you.

[The prepared statement of Mr. Dichter follows:]

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TESTIMONY OF

MARK S. DICHTER

MORGAN, LEWIS & BOCKIUS

PHILADELPHIA, PENNSYLVANIA

BEFORE THE

LABOR-MANAGEMENT SUBCOMMITTEE

AND

EMPLOYMENT OPPORTUNITIES SUBCOMMITTEE

OF THE HOUSE EDUCATION AND LABOR COMMITTEE

AND

THE SELECT COMMITTEE ON AGING

SEPTEMBER 21, 1989

Messrs. Chairmen and Members of the Committees, I am Mark S. Dichter, a partner in the law firm of Morgan, Lewis & Bockius, where, for over 20 years, I have been engaged in the counseling and representation of employers in all aspects of labor and employment law and, in particular, equal employment opportunity law. I am testifying here today on behalf of the Association of Private Pension and Welfare Plans ("APPWP"), the Chamber of Commerce of the United States ("the Chamber"), the National Association of Manufacturers ("NAM"), and the ERISA Industry Committee ("ERIC"). I am grateful to have the opportunity to present to these Honorable Committees the concerns of the APPWP, the Chamber, NAM, and ERIC, as well as my own concerns, as to the significant adverse impact the passage of H.R. 3200 will have on widely used fringe benefit and retirement plans which provide extensive benefits to all workers and, in particular, to older workers.

I have recently completed a three year term as the Management Co-Chair of the Committee on Equal Employment Opportunity Law of the American Bar Association's Section on Labor and Employment Law ("ABA EEO Committee"). I have also served as the Editor-in-Chief of the Supplements to Employment Discrimination Law, published by the American Bar Association and the Bureau of National Affairs. This is generally recognized as the leading treatise in the field of employment discrimination law.

The ABA EEO Committee is the principal organization representing practicing lawyers in the equal employment field. Our members consist of attorneys who regularly represent employees, claimants, labor organizations, employers, and organizations such as the American Association of Retired Persons ("AARP") and the NAACP Legal Defense Fund, Inc. The ABA EEO Committee is the primary liaison between the American Bar Association and the Equal Employment Opportunity Commission and the U.S. Department of Labor with respect to equal employment matters. Through the liaison activities of the ABA EEO Committee and my counseling and representation of employers with respect to age discrimination and employee benefit issues, I have had extensive experience with respect to the Age

Discrimination in Employment Act ("ADEA") and its impact on employee benefit plans.

Though entitled the "Older Worker's Benefit Protection Act," the proposed amendment to the ADEA, if enacted, would: (1) jeopardize many existing retirement plans which are based on generally accepted, actuarially based, principles; (2) jeopardize the use of popular early retirement incentive programs; and (3) invalidate many widely utilized benefit practices, including the coordination of various benefit programs and the use of general mortality tables. The proposed legislation thus would adversely affect most directly those benefit plans which benefit older workers in particular. In short, the legislation would hurt most those older workers it purports to protect.

Section 2 of the Bill sets forth a "finding" that "legislative action is necessary to restore the original Congressional intent in passing and amending" the ADEA. The finding is premised upon the conclusion that the Supreme Court's recent decision in Public Employees Retirement System of Ohio v. Betts, ____ U. S. _______, 109 S. Ct. 256 (1989) subverted the original Congressional intent. Section 2 further describes the intent of Congress in 1967, when the ADEA was passed, and in 1978, when it was amended, as being "to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations." These findings are incorrect as a matter of fact and law and, more importantly, are imprudent as a matter of policy. As a result, the legislation attempts to remedy a problem that does not exist, and in the process, actually imperils the benefits of all workers and, in particular, the benefits of older workers.

Inherent in the rush to amend the ADEA in light of the Supreme Court's Betts decision is the erroneous assumption that the Supreme Court's holding -- that Section 4(f)(2) of the ADEA exempts employee benefit plans from the coverage of the Act except to the extent plans are used as a subterfuge for age discrimination in other aspects of the employment relation -- somehow will result in employers changing their benefit plans to the detriment of older workers. With respect to age discrimination, however, retirement and other benefit plans are not somehow different in their design and operation today than they were in 1967 when they were first exempted from the ADEA. In all pertinent respects, they are the same. Retirement plans have always taken into account actuarial considerations; early retirement incentives have long been provided; and most plans have always coordinated the benefits provided with those provided by other benefit programs. Congress recognized this and the significant problems that would be presented by the impact on benefit plans of any age discrimination legislation that failed to take these factors into account. That is the reason the 1967 Congress exempted bona fide employee benefit plans from the ADEA.

Factors Leading To The Enactment Of The ADEA In 1967

In considering age discrimination legislation back in the 1960s, Congress understood that age discrimination is by nature different from discrimination on the basis of race or sex. For that reason, it did not include age among the prohibitions in Title VII. Rather, recognizing the complexity of age discrimination issues, Congress directed the Secretary of Labor to study the problem of age discrimination in employment. The Secretary did so and, in June 1965, drew the conclusion that "'discrimination' means something very different, so far as employment practices involving age are concerned, from what it means in connection with discrimination involving -- for example -- race." The Older American Worker: Age Discrimination in Employment, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964, at 2 (1965) ("Secretary's Report"), reprinted in EEOC Legislative History of the Age Discrimination in Employment Act of 1967, at 20 (1981) ("EEOC Legislative History").

The Secretary's Report found that, in contrast to race discrimination, age discrimination is rarely based on a mere dislike for older workers. Id. Rather, the Report found that age discrimination is principally based on three other factors: (a) unfounded assumptions about the effect of age upon ability to perform; (b) actual relationships between age and ability to do a job; and (c) institutional arrangements -- such as pension, seniority, insurance, and promotion-from-within policies --

that, although often designed to protect the older worker, may have an adverse impact on the hiring of older workers. Id. Importantly, the Report made it clear that only decisionmaking based on unfounded assumptions about the effect of age on ability constitutes "arbitrary age discrimination" within the meaning of Congress. Id. The Report concluded that it is "contrary to the public interest[] to conceive of all age restrictions as 'arbitrary'" and thus recommended that Congress "concentrate on the prohibition of practices which include this element." Id. at 21.

Significantly, the Report also made it clear that employee benefit plans are "institutional arrangements" which, while sometimes adversely affecting the employment of older workers, are not examples of the "arbitrary" age discrimination with which Congress should be concerned. Secretary's Report, at 15. Moreover, the Report stressed that "[i]t is not clear to what extent [exclusions of older workers from the workforce] arise directly from cost factors and to what extent they are the result of plan operations largely unrelated to costs." Id. at 16. The Report concluded that "[c]ase-by-case examination is necessary" to determine which benefit "plan-induced limitations on employment can be considered to constitute arbitrary discrimination[.]" Id. at 17.

Accordingly, when the Secretary, at Congress's request, submitted a draft bill, he did not include the version of § 4(f)(2) that is presently in the statute. Rather, § 4(f)(2) of the Administration bill provided only that it shall not be unlawful "to separate involuntarily an employee under a retirement policy or system where such policy or system is not merely a subterfuge to evade the purpose of this Act[.]" EEOC Legislative History, at 68. Senator Yarborough introduced the Administration bill, and both houses conducted extensive hearings at which numerous witnesses testified.

On the very first day of hearings, Senator Javits criticized this aspect of the Administration bill, stating that:

> the age discrimination law should not be used as the place to fight the pension battle but that we ought to subordinate the importance of adequate pension benefits for older workers in favor of the employment of such older workers and not make the equal treatment under pension plans a condition of that employment.

Age Discrimination in Employment: Hearings on S.830 and S.788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. 27 (1967) ("Senate Hearings"). In his view, a "fairly broad exemption ... for bona fide retirement and seniority systems [would] facilitate hiring rather than deter it and make it possible for older workers to be employed without the necessity of disrupting those systems." Id. at 28. As a result, he proposed to introduce an amendment that would grant employers "a degree of flexibility" with respect to employee benefit plans. Id. at 27.

Although Secretary of Labor W. Willard Wirtz testified that "the effect of the provision in section 4(f)(2) [of the Administration bill] ... is to protect the application of almost all plans which I know anything about" (Senate Hearings at 53), Senator Javits, the next day on the Senate floor, proposed to replace § 4(f)(2) of the Administration bill with an amendment making it lawful for an employer:

> to observe a seniority system or any retirement, pension, employee benefit, or insurance plan, which is not merely a subterfuge to evade the purposes of this Act, except that no such retirement, pension, employee benefit, or insurance plan shall excuse the failure to hire any individual.

113 Cong. Rec. 7077 (March 16, 1967), reprinted in EEOC Legislative History, at 72. Senator Javits reiterated his view that "the age discrimination law is not the proper place to fight this particular battle," and noted that he had "recently introduced a comprehensive bill to deal with this problem." 113 Cong. Rec. 7076 (March 16, 1967), reprinted in EEOC Legislative History, at 71. The bill to which he referred was a precursor to ERISA, the comprehensive benefits statute that Congress eventually enacted in 1974.

In subsequent hearings, representatives of the business community also urged that a broader exception for employee benefit plans be adopted than that contained in the Administration bill. Otherwise, they said, "hundreds of long established, bona fide pension, group life insurance, medical and other employee benefit plans may be in violation of section 4(a)(1)." Senate Hearings, at 280; see also, e.g., id. at 296, 323.

The reported bill included an amendment (with slight modification) like that proposed by Senator Javits. In floor debate before the Senate, Senators Javits and Yarborough discussed the full effect of § 4(f)(2), making it clear to all that an employer would not have to provide the same benefits to older workers that it provides to younger ones, and that an older employee who would not have been employed except for the law does not have to be included in a benefit plan at all. 113 Cong. Rec. 31255, reprinted in EEOC Legislative History at 146. Indeed, Senator Yarborough specifically stated that "this will not disrupt the bargained-for pension plan. This will not deny an individual employment or prospective employment but will limit his rights to obtain full consideration in the pension, retirement, or insurance plan." Id.

It is just as clear from the floor debate in the House that members of that branch similarly understood that the amended § 4(f)(2) would broadly protect employee benefit plans, even where the plans completely excluded older workers. See, e.g., 113 Cong. Rec. 34740 (December 4, 1967)(remarks of Rep. Perkins), reprinted in EEOC Legislative History, at 151; 113 Cong. Rec. 34750 (December 4, 1967)(remarks of Rep. Randall), reprinted in EEOC Legislative History, at 161; 113 Cong. Rec. 34745 (December 4, 1967)(remarks of Rep. Smith), reprinted in EEOC Legislative History, at 156. Representative Dent, Chairman of the House Committee, thus stated that the amended § 4(f)(2) "serves to emphasize the primary purpose of the bill

-- hiring of older workers -- by permitting employment without necessarily including such workers in employee benefit plans. The specific exception ... is considered vital to the legislation." 113 Cong. Rec. 34747 (December 4, 1967), reprinted in EEOC Legislative History, at 159.

It was with this understanding that Congress passed the bill as amended, and it was signed into law.

It is, therefore, simply not true that, in enacting the Age Discrimination in Employment Act, Congress intended § 4(f)(2) to be limited by an age-related cost justification test. In fact, exactly the opposite is the case. Cost justification requires case-by-case scrutiny of individual eligibility requirements and benefit levels, an approach Congress dismissed when it declined to adopt the Administration bill as proposed. It fails to acknowledge that employee benefit plan-related barriers to the full employment of older workers extend beyond age-related benefit costs, and thus does not fully respond to the institutional concerns which the Secretary and Congress found had resulted in the unemployment of older persons. Indeed, if § 4(f)(2) was limited to strict age-based cost justifications, then a myriad of employee benefit plans which existed at the time of the enactment of the ADEA -- plans, which relied on various age-based actuarial assumptions and contained various benefit integration schemes -- would have been deemed unlawful and would have had to have been changed. This is obviously contrary to Congress' clear intent to prevent the disruption of employee benefit plans in the passage of the ADEA, and to leave their regulation to a more studied and comprehensive statutory scheme dealing directly with employee benefits.

The Comprehensive Regulations of Employee Benefits Was Accomplished by Congress Through the Enactment of ERISA

After the ADEA was enacted, Congress did not forget its concerns about employee benefit programs. In 1974, it enacted the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, *et seq*., fulfilling its promise to comprehensively regulate the full gamut of employee benefits.

ERISA represents, as the Supreme Court has unanimously observed, "a 'comprehensive and reticulated statute,' which Congress adopted after careful study of private retirement pension plans." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981), *quoting* *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980). ERISA established minimum rules for employee participation, funding standards to increase solvency of pension plans, fiduciary standards for plan managers, and an insurance program in case of plan termination. Recognizing the complexity of this subject, Congress divided administrative responsibility among several agencies -- principally, the Department of Labor, the Internal Revenue Service and -- a new entity created by ERISA -- the Pension Benefit Guaranty Corporation.

Some supporters of H.R. 3200 assert that, from the beginning, it was Congress's intent that retirement benefits not be integrated with other benefits. They say that pension and other benefits (such as separation pay benefits) serve different purposes and thus may never be treated as substitutes for each other. Contrary to these claims, however, it is clear that, in enacting ERISA, "Congress did not prohibit 'integration,' a calculation practice under which benefit levels are determined by combining pension funds with other income streams available to the retired employees." Alessi, supra, 451 U.S. at 514. Rather, following its extensive study of private pension plans before the adoption of ERISA, Congress "acknowledged and accepted the practice, rather than prohibiting it." Id. at 516. The Report of the House Ways and Means Committee noted that

> many present plans are fully or partly integrated and ... elimination of the integration procedures could substantially increase the cost of financing private plans. Employees, as a whole, might be injured rather than aided if such cost increases resulted in slowing down the growth or perhaps even eliminate[ing] private retirement plans.

H.R. Rep. No. 807, 93d Cong. 2d Sess. 69 (1974), reprinted in 2 Legislative History of the Employee Retirement Income Security Act of 1974 3189 (1976). Further, as the Supreme Court recognized in Alessi, "integration allows the employer to attain the selected pension level by drawing on other resources, which, like Social Security, also depend on employer contributions." 451 U.S. at 514. Indeed, as the Court further recognized, integration of benefits promotes the provision of benefits and the sound funding of pensions plans. 451 U.S. at 514-516.

Thus, it is patent that, contrary to the findings contained in Section 2 of the bill being considered by this Committee, it was not the original intent of Congress in passing the ADEA that bona fide employee benefit plans be subjected to a cost justification test or an anti-integration rule. Because the integration of benefit plans was not even an issue at the time that Congress passed it, the ADEA does not expressly address the subject, since it exempts all bona fide employee benefit plans. However, when the issue was expressly addressed in Congress's consideration of ERISA, the intent of Congress on that point is undeniably clear: it approved of this longstanding design practice.

That the purposes of the ADEA do not preclude the integration of benefits is confirmed by the fact that Congress has expressly proscribed the payment of severance benefits to various groups of retirement-eligible federal employees. Congress enacted these proscriptions both before and after the ADEA was enacted in 1967 and extended to federal employment in 1974; indeed, the principal proscription was enacted by the same Congress that enacted the ADEA. See 5 U.S.C. § 5595(a)(2)(iv). See also 10 U.S.C. § 1186(b)-(c)(1983) and 10 U.S.C. § 1174(e),(h)(1983 and 1986 Supp.)(officers and enlisted members eligible for voluntary retirement from active military service not entitled to separation pay); 14 U.S.C. §§ 286(b), 296a(d), and 327(b)(1988 Supp.)(Coast Guard officers); 33 U.S.C. § 853h(e)(1986)(commissioned officers of National Oceanic and Atmospheric Administration). A finding that the ADEA has always precluded the integration of benefits requires this body to conclude that Congress has repeatedly flouted its own declaration of policy. There is simply no basis in the ADEA for a finding that Congress has committed "such a breach of faith." Espinoza v. Farah Mfg. Co., 414 U.S. 86, 90-91 (1973).

The 1978 Amendment Only Prohibited Involuntary Retirement; No Other Changes Were Made to Section 4(f)(2)

Congress began considering the possible amendment of § 4(f)(2) in 1977. At that time, the federal circuit courts of appeals had issued conflicting decisions concerning the legality of involuntary retirement provisions. Compare Brennan v. Taft Broadcasting Co., 500 F.2d 212 (5th Cir. 1975)(such provisions lawful) and Zinger v. Blanchette, 549 F.2d 901 (3d Cir. 1977)(same), cert. denied, 434 U.S. 1008 (1978) with McMann v. United Air Lines, Inc., 542 F.2d 212 (4th Cir. 1976)(such provisions unlawful). Although the Supreme Court had granted a writ of certiorari in the McMann case so that it could address the issue, the House Committee on Education and Labor decided to resolve the conflict itself.

On July 25, 1977, the Committee reported a bill proposing to amend § 4(f)(2) to make it clear that no employee benefit plan could require or permit the involuntary retirement of an individual because of his age. *See* H.R. 5383, 95th Cong., 1st Sess. (July 25, 1977), *reprinted in* *EEOC Legislative History*, at 392. The scope of the amendment referred to the Senate was very limited, as is evident from the legislative history. *See*, *e.g.*, H.R. Rep. No. 527, 95th Cong., 1st Sess. 26-30 (1977), *reprinted in* *EEOC Legislative History*, at 386-90 (additional views of Rep. Weiss)(the amendment's only effect would be to make mandatory retirement unlawful); 123 Cong. Rec. 34323 (October 19, 1977)(remarks of Sen. Kennedy), *reprinted in* *EEOC Legislative History*, at 510 (amendment "clarifies the congressional intention behind [§ 4(f)(2),] which allows lesser benefits to be given to older workers in pension, retirement, and insurance plans"; "the differentiation is allowed for purposes of fringe benefits alone and is not for purposes of allowing an earlier retirement age").

While a House-Senate conference committee was considering the two chambers' respective bills, the Supreme Court handed down its decision in *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977). The Court ruled that the ADEA, as originally enacted, did not prohibit involuntary retirements pursuant to the terms of a bona fide employee benefit plan. The Court reasoned that the language and legislative history of the statute indicate that Congress intended generally to insulate employee benefit plans from challenge under the ADEA; that plans can be challenged only if they are a "subterfuge" to evade the requirements of the ADEA; and that an involuntary retirement provision of a plan that pre-dates the enactment of the ADEA cannot possibly be such a "subterfuge." The Court concluded that:

> [W]e find nothing to indicate Congress intended wholesale invalidation of retirement plans instituted in good faith before its passage, or intended to require employers to bear the burden of showing a business or economic purpose to justify bona fide pre-existing plans.

Id. at 203.

Thereafter, after the Conference Committee released its report and the amendment was debated on the floors of both houses, the amendment was passed. The statutory language focuses on the involuntary retirement issue. The legislative debate also was principally directed to this issue. Those voting for the amendment stressed that, with the exception of abolishing involuntary retirement provisions, the amendment "would not alter existing law with respect to these practices." See, e.g., H.R. Rep. No. 493, 95th Cong., 1st Sess. 5 (1977), reprinted in EEOC Legislative History, at 438; 123 Cong. Rec. 34295 (October 19, 1977), reprinted in EEOC Legislative History, at 482. Existing law included an appellate decision expressly rejecting an attempt to put an age-related cost justification limitation on Section 4(f)(2). See Brennan v. Taft Broadcasting Co., 500 F.2d at 215-17.

Thus, the intent of Congress in 1978 was to amend § 4(f)(2) to prohibit involuntary retirement. The amendment of that section did no more. It did not either by its terms or effect engraft a cost justification requirement onto § 4(f)(2). It did not in any way prohibit benefit integration.

The Department of Labor and the EEOC Have Been Inconsistent with Their Interpretations of § 4(f)(2) By Not Always Requiring Age-Cost Justification

Supporters of the present proposals to amend the ADEA contend that legislation is necessary to recussitate the longstanding view of the administrative agencies that § 4(f)(2) is limited to age-cost justified distinctions. Again, history does not support this claim.

The initial 1968 ADEA interpretations did not even refer to § 4(f)(2). See 33 Fed. Reg. 9172-73 (1968). The first interpretations dealing with the subject were published by the Department of Labor (DOL) on January 9, 1969, more than a year after the ADEA was enacted. See 34 Fed. Reg. 322-23 (1969). These interpretations stated (29 C.F.R. § 860.120) that:

> [a]n employer is not required to provide older workers who are otherwise protected by the law with the same pension, retirement or insurance benefits as he provides to younger workers, so long as any differential between them is in accordance with the terms of a bona fide benefit plan. For example, an employer may provide lesser amounts of insurance coverage under a group insurance plan to older workers than he does to younger workers, where the plan is not a subterfuge to evade the purpose of the Act. A retirement, pension or insurance plan will be considered in compliance with the statute

> where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.

While this interpretation offered a "safe-harbor" to any employer who could show that an age-based variance had a cost justification, it plainly did not interpret § 4(f)(2) as being limited *only* to such variances.

On June 21, 1969, the DOL published another set of interpretations. *See* 34 Fed. Reg. 9708-09 (1969). These interpretations merely added another administrative "safe-harbor":

> Further, an employer may provide varying benefits under a bona fide plan to employees within the age group protected by the Act, when such benefits are determined by a formula involving age and length of service requirements.

It is clear from the interpretation that § 4(f)(2) could apply to plans -- such as profit-sharing retirement plans -- that predicate age-based benefit variances on factors other than age-related costs:

> [W]here it is the essential purpose of a plan financed from profits to provide retirement benefits for employees, the exception may apply. The "bona fides" of such plans will be considered on the basis of all the particular facts and circumstances.

In 1979, the DOL promulgated an interpretative bulletin to implement the 1978 amendments to the ADEA, including the new prohibition on involuntary retirement. This bulletin, like the 1969 bulletin, was *not* a substantive regulation and did not have the force and effect of law. Rather, it was a statement of the positions that the DOL intended to take in court in enforcing the ADEA.

Specifically, the 1979 Bulletin stated that DOL understood the phrase "employee benefit plan" to refer to all plans providing "fringe benefits." See 44 Fed. Reg. 30648, 30658 (1979). It also stated -- for the first time -- that it would attempt to characterize as a "subterfuge" any benefit variance without an age-related cost justification. See id. Moreover, while it allowed for some exceptions, the 1979 bulletin generally adopted a benefit-by-benefit approach to cost justification, as opposed to a benefit package approach. See 44 Fed. Reg. at 30659. Obviously, the 1979 bulletin was a radical departure from the language of the statute, and went well beyond the "safe harbors" contained in the earlier administrative interpretations.

Responsibility for enforcing the ADEA was subsequently transferred to the EEOC. The EEOC adopted the Department of Labor's interpretive bulletin without making any changes -- but the bulletin remained an interpretation, not a regulation with the force and effect of law. Thus, the employer community was not legally bound to follow the Bulletin and, as it turned out, the EEOC declined to so as well.

Specifically, notwithstanding the language of the 1979 bulletin (and the arguments of the proponents of H.R. 3200 that the interpretive bulletins have consistently required age-cost justified distinctions), the EEOC has recently taken the position that the cost justification theory set forth in the 1979 bulletin is not the exclusive test for determining whether a voluntary early retirement plan qualifies for protection under § 4(f)(2). When invited by the Second Circuit in Cipriano v. Board of Education, 785 F.2d 51 (2d Cir. 1986), to express its views on the application of § 4(f)(2) to early retirement incentive programs, the EEOC asserted that an employer need not show a strict age-related cost justification; rather the EEOC asserted that it was sufficient that the employer "demonstrate a legitimate business reason," such as an analysis of "increasing costs and/or declining benefit to the employer in providing the retirement incentives." "Memorandum of Law for the Equal Employment Opportunity Commission as Amicus Curiae," filed in Cipriano v. Board of Education, No. 84-CV-80C (W. D. N. Y.) at 31-33. The Commission took the position that early retirement incentive programs are lawful under § 4(f)(2) if all retirement-eligible employees are permitted to participate voluntarily in the plan and there is a legitimate business reason for structuring the plan with an age limitation. Cipriano v. Board of Education, 700 F. Supp. 1199, 1207-08 (W. D. N. Y. 1988).

Moreover, earlier this spring, in both his brief and oral argument to the Supreme Court in Betts, the Solicitor General conceded on behalf of the EEOC that § 4(f)(2) is not "absolutely limited to cost-based justifications" (Oral Arg.

Tr. 43). Indeed, the Solicitor General admitted that § 4(f)(2) "allows employers to bar older employees from participating in employee benefit plans altogether where they [cannot] work for the employer long enough to qualify" (EEOC Brief at 19 n.11).

In short, the administrative agencies charged with enforcing the ADEA have embraced the age-related cost justification limitation for only part of the past 22-year period. It is neither the original interpretation nor the final interpretation. Thus, again contrary to the assumption of supporters of Section 2 of H.R. 3200, there is nothing "consistent" about the interpretations of the administrative agencies.

The Judicial Decisions Pre-*Betts* Have Been Inconsistent in Their Interpretation of § 4(f)(2)

The judicial decisions prior to *Betts* also reflect this confusion and inconsistency. They demonstrate that, contrary to the assertions of supporters of H.R. 3200, *Betts* did not upset settled law.

Early Decisions: Significantly, the first important decision after the promulgation of the 1979 bulletin implicitly rejected critical assumptions of that bulletin. In 1981, a unanimous Supreme Court, in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), held that the integration of benefits *is permitted* under ERISA, and, indeed, is central to the accomplishment of that statute's purposes. The Court found that, in ERISA, Congress had approved of benefit integration and determined that prohibition of it would simply lead to the slowing down or elimination of benefit plans, and impair the funding of pension plans. Thus, as Justice Marshall stated for the Court, "the same Congressional purpose -- promoting a system of private pensions by giving employers avenues for cutting the cost of their pension obligations -- underlies all such offset possibilities." Id. at 517. Although Alessi was not an ADEA case, it nevertheless is irreconcilable with H.R. 3200's limited acceptance of integration of benefits.

In 1982, the Fifth Circuit Court of Appeals in Alford v. City of Lubbock, 664 F.2d 1263 (5th Cir.), cert. denied, 456 U.S. 975 (1982), expressly repudiated another assumption of the 1979 Bulletin (and H.R. 3200): It invalidated the bulletin to the extent that it permitted exclusion of employees from a defined contribution plan only if the exclusion was justified on the basis of age-related cost considerations. In so doing, the Court upheld the complete exclusion from a defined contribution plan of employees over the age of 50. The Alford court reaffirmed the holding of an earlier Fifth Circuit case -- Brennan v. Taft Broadcasting Co., 500 F.2d 212 (1974) -- in which the court had reject the age-related cost justification rule. As the Fifth Circuit noted in Alford, "Congress sought to avoid using [the ADEA] as the ground on which 'to fight' in Senator Javits' words, 'the pension battle'" (id. at 1270) -- a position later affirmed by the Supreme Court in Betts.

Later Decisions: Other courts also rejected, either explicitly or implicity, the age-related cost justification test of the Bulletin. See, e.g., Germann v. Levy, 553 F. Supp. 700 (ND Ill. 1982); EEOC v. Westinghouse Electric Corporation, 577 F. Supp. 1029, 1036 (D.N.J. 1982), rev'd, EEOC v. Westinghouse, supra. Indeed, it was not until December 1983 and January 1984 -- 16 years after the enactment of the ADEA -- that courts began to embrace the position of the pending legislation -- to wit, that age-based benefit reductions in employee benefits could be justified only by age-based cost considerations. See EEOC v. Westinghouse Electric Corp., 725 F.2d 211 (3d Cir. 1983), cert. denied, 469 U.S. 820 (1984); EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984); Significantly, however, even these decisions were tentative in their conclusions. See id. at 1396-97 (result might be different if benefit policy was an "integral part of a complex benefit scheme,").

The Court Have Differed Over the Issue of Qualification of Plans Under § 4(f)(2)

In later cases, the courts agreed only to disagree. Thus, the courts have applied differing standards and tests to determine whether an employer's plan is exempt from the ADEA under § 4(f)(2). Whether analyzed in terms of the proper scope of the meaning of "employee benefit plan" or the meaning of "subterfuge," it is clear that there has been no uniform acceptance by the courts of the age-cost justification urged by the supporters H.R. 3200.

The "Plan" issue. Several courts have rejected the strict age-based cost standard adopted by the Third Circuit for establishing that a plan is an "employee benefit plan." I have already noted that Fifth Circuit did so in Alford and Taft Broadcasting. The Second Circuit has done so as well. In Cipriano v. Board of Education, supra, the Second Circuit rejected the plaintiff's argument that an early retirement incentive plan could only be justified by "actuarially significant cost reductions." 785 F.2d at 54. The Second Circuit reaffirmed its rejection of a strict age-based cost requirement in Potenze v. New York Shipping Ass'n, 804 F.2d 235 (2d Cir. 1986), in which the court upheld the defendant's guaranteed annual income plan that offset social security benefits from plan benefits for employees over 65, but not for those employees between the ages of 62 and 65. The court, quoting from Judge Friendly's opinion in Cipriano, noted that for determining whether a plan is a "bona fide employee benefit plan," "it is immaterial that a more nicely tailored plan [might have distributed the cost savings more evenly among various age groups.]" Id. at 238 (citing Cipriano, 785 F.2d at 55).

By contrast, a few other courts have joined the Third Circuit in accepting an age-based cost test. Most notably, the Sixth Circuit, in Betts v. Hamilton County Board of Mental Retardation and Developmental Disabilities, 848 F.2d 692 (1988), rev'd, 109 S. Ct. 2854 (1989), held that the employer's disability insurance plan violated the ADEA because, in some limited circumstances, employees who became disabled after age 60 would receive lower monthly than employees who became disabled before age 60. The Sixth Circuit found that the benefits were not the type of benefits included within § 4(f)(2), and, quoting the Seventh Circuit, stated that, "where . . . the employer uses age . . . as the basis for varying retirement benefits, he had better be able to prove a close correlation between age and cost if he wants to shelter in the safe harbor of [29 U.S.C. § 623(f)(2)]." Betts, 848 F.2d at 694 (quoting Karlen v. City Colleges of Chicago, 837 F.2d 314, 319 (7th Cir.), cert. denied, 108 S. Ct. 2038 (1988). See also EEOC v. Great Atlantic & Pacific Tea Co., 618 F. Supp. 115 (N.D. Ohio 1985); EEOC v. Babcock & Wilcox Co., 43 Fair Empl. Prac. Cas. (BNA) 736 (1987).

The "Subterfuge" Issue. Some courts have concentrated their attention on whether an employer's plan is a "subterfuge to evade the purposes" of the ADEA. The disagreement as to the proper standard or test extends to this analysis as well.

For example, the Second Circuit, in Cipriano, supra, refused to endorse in the EEOC's guidelines on "subterfuge," which require employers to justify any age-based reductions in benefits by providing evidence of age-based cost considerations. Instead, the Second Circuit held that an employer can prove that its plan is not a subterfuge "by showing a legitimate business reason for structuring the plan as it did." Id. at 58.

Subsequently, in Potenze, supra, the Second Circuit reiterated that a plan is not a subterfuge simply because it is not the least restrictive plan available. 804 F.2d at 238. Such an interpretation would, according to the court, "operate to frustrate the purposes of the ADEA." Id. at 239. See also Cipriano v Board of Education, 700 F. Supp. 1199 (W.D.N.Y. 1988)(employer can lawfully offer early retirement incentive plan if there is a "legitimate business reason" for structuring the plan with specific age limitations); EEOC v. Home Insurance Co., 672 F.2d 252, 260 (2d Cir. 1982)(to prove absence of subterfuge, employer must prove the existence of "valid business reasons" for its action).

The Fourth Circuit and a Rhode Island District Court have similarly adopted a "business or economic purpose" test for determining whether a plan is a "subterfuge." See Crossland v. Charlotte Eye, Ear and Throat Hospital, 686 F.2d 208, 213 (4th Cir. 1982); Abenante v. Fulflex, Inc., 701 F. Supp. 296 (D.R.I 1988), appeal pending, No. 89-1180.

The Third Circuit, on the other hand, has accepted the EEOC's position. See EEOC v. City of Mt. Lebanon, 842 F.2d 1480 (3d Cir. 1988). In Mt. Lebanon, the Third Circuit rejected the Second Circuit's "legitimate business reason" test and held instead that, "to disprove subterfuge, an employer must demonstrate that it reduced benefits for older workers only to the extent required to achieve approximate equivalency in the cost of providing benefits to older and younger workers." 842

F.2d at 1491 n.9. In that case, the court found that the city had not proven that its long term disability plan that provided for termination of benefits to employees age sixty-two through sixty-eight was not a subterfuge. Although the city offered evidence in the form of affidavits from its insurer and the person who set up the disability plan that the cost of insuring against disability increased with age, the court found that such general cost data supplied by the insurance company was insufficient to meet the city's burden of proof. Instead, the court held that the employer must establish a nexus between the general data and the specific level of reductions set forth in the plan. Thus, according to the Third Circuit's view, the employer's burden of proving that the plan is not a subterfuge is very heavy indeed, and, in many cases, cannot be met by providing data supplied by the employer's insurer. This is a far cry from anything Congress possibly could have intended when it enacted § 4(f)(2).

Finally, at least three courts of appeals have rejected any test that would require an employer to establish an age-based cost justification or other business justification where the plan is a pre-Act plan. See EEOC v. State of Maine, 823 F.2d 542 (1st Cir. 1987), aff'd 655 F. Supp. 223 (D.Me. 1986); EEOC v. County of Orange, 837 F.2d 420 (9th Cir. 1988)(rejecting age-cost test for pre-Act plan, and noting that the court is not bound by the DOL/EEOC interpretative regulations); EEOC v. Cargill, Inc., 855 F.2d 420 (10th Cir. 1988)(no age-cost proof required in case of pre-Act plan); see also EEOC v. Fox Point Bayside School Dist., 772 F.2d 1294 (7th Cir. 1985); Carpenter v. Continental Trailways, 635 F.2d 578 (6th Cir. 1980), cert. denied, 451 U.S. 986 (1981).

The Courts Have Also Disagreed About The Extent To Which § 4(f)(2) Permits The Integration of Benefits

The Third Circuit, in EEOC v. Westinghouse Electric Corp., 869 F.2d 696, supra, held that severance benefits and pension benefits cannot lawfully be integrated. The court reasoned that the severance benefit plans merely provided "fringe benefits" for the short term, while pension benefits were designed to provide long term financial support. See also EEOC v. USX Corp., supra.

Similarly, the Ninth Circuit and the District Courts for the Northern District of Ohio and the Eastern District of North Carolina have held that, on the facts of the particular cases under review, severance benefits had not lawfully been integrated with pension benefits. See EEOC v. Borden's, supra (no integration of severance and pension benefits where severance pay plan was negotiated one month prior to the plant closing and the pension, retirement and insurance plans were embodied in different documents); EEOC v. Great Atlantic & Pacific Tea Co., supra (no integration of severance and pension benefits plans were "adopted at different times and negotiated separately"); EEOC v. Babcock & Wilcox Co., 43 Fair Empl. Prac. Cas. (BNA) 736 (E.D.N.C. 1987) (same).

Other courts have recognized the laudable goals served by integration of benefits, and have endorsed the practice under either ERISA or the ADEA. See, e.g., Alessi v. Raybestos-Manhattan, supra; Britt v. E.I. DuPont de Nemours & Co., 768 F.2d 593 (4th Cir. 1985) (rejecting challenge to provision of severance pay plan which limited severance benefits to employees who had deferred their pension eligibility); Parker v. FNMA, 741 F.2d 975 (7th Cir. 1984)(rejecting challenge to policy which gave employees the choice between retiring or taking severance pay); EEOC v. Airline Pilots, 661 F.2d 90 (8th Cir. 1981) (integrated provisions of vacation benefits policy upheld against ADEA challenge); Arnold v. USPS, 863 F.2d 994 (D.C. Cir. 1988) (integrated provisions of seniority system upheld against ADEA challenge); Abenante v. Fulflex, supra (the integration of pension and severance benefits permissible under ADEA); EEOC v. Firestone Tire & Rubber Co., 650 F. Supp. 1561 (W.D. Tenn 1987)(approving of integration of pension and severance benefits); Khan v. Grotnes Metalforming Systems, 679 F. Supp. 751 (N.D. Ill. 1988) (no ADEA violation where enhanced early retirement benefits are given instead of severance pay).

The Use of Actuarial Present Values

One last area of judicial decision is worth mentioning, not so much because of the judicial disagreement in the area (as there is none), but because of the litigation position that the EEOC has taken there. In Abenante v. Fulflex, No. 87-0456-B

(D.R.I. 1988), the EEOC claimed that the use of actuarial data in benefit calculations creates a prima facie violation of the ADEA, and that an employer cannot satisfy the age-based cost justification test where it has not incurred the same present cost for older employees as it had for younger employees (even if it eventually will do so). The district court rejected the EEOC's challenge, holding that Congress could not possibly have intended "the ADEA to prohibit employers from using actuarial data in all separation pay and pension benefit plans." This decision is consistent with prior ADEA case law, which recognizes that, in contrast to Title VII's treatment of race and sex discrimination, Congress did not intend in the ADEA to bar all use of age as a decisionmaking criterion in employment decisions. See Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1985). The decision is also consistent with common sense: Use of actuarial data is essential to the provision of pensions and insurance, and the ADEA cannot sensibly be interpreted to prohibit its use or to preclude reference to present value calculations based on it.

Summary: This somewhat detailed outline of the pre-Betts case law on § 4(f)(2) illustrates that, contrary to the claims of the supporters of H.R. 3200, there has been very little agreement among the district courts and circuit courts as to what standards and tests govern the application of § 4(f)(2) of the ADEA. It also shows that there certainly has been no "consistent" standard from which the Supreme Court's Betts decision could have deviated. Finally, it demonstrates that the EEOC itself has not been consistent in its interpretation of § 4(f)2 -- sometimes arguing that age-cost justifications are always required and on other occasions recognizing that there can be other acceptable "legitimate business reasons" which justify age-based distinctions in benefits plans under § 4(f)(2).

The Supreme Court's Betts Decision Is a Correct Interpretation of § (f)(2)

It is against the backdrop of this divergent judicial opinion that the United States Supreme Court reached its decision in Betts. The Court's decision in that case, rather than departing from settled law, reconciled the case law and reaffirmed long-standing congressional policy.

In Betts, seven members of the Supreme Court -- who were nominated by four different administrations -- held that the EEOC's age-cost interpretations was supported by neither the text nor the language and legislative history of the ADEA. The Court, after an extensive examination of the language and legislative history of the ADEA, found that Congress intended only limited coverage of employee benefit plans when it enacted the ADEA in 1967. More extensive legislation regarding those plans was "left . . . for another day." Betts, 109 S. Ct. at 2866.

Thus, the Betts Court, in accordance with a number of lower courts, held that a plan need not be a retirement, pension or insurance plan in order to be an "employee benefit plan" under

§ 4(f)(2). And while the Court did not provide an opinion on the precise meaning of "employee benefit plan," it noted that even the EEOC's own guidelines, which define an "employee benefit plan" as one which provides "fringe benefits," suggests that an age-cost justification is not required. Id. at 2864.

Moreover, the Court's interpretation of subterfuge is consistent with both congressional intent and the Court's prior decisions. The Court in Betts thus held that, to prove that a plan is a subterfuge, the plaintiff must prove that the employer actually intended for the plan to discriminate in a "nonfringe-benefit" aspect of the employment relationship. Id. at 2866. In McMann, the Court's first decision on the subterfuge issue, the Court clearly stated that a finding of subterfuge includes a subjective intent. To this extent, Betts did not change the law, but rather reaffirmed what the lower courts and the EEOC had disregarded. Finally, the Court also reaffirmed McMann's holding that a pre-Act plan is not a subterfuge under § 4(f)(2) even if the plan is not supported by age-related cost considerations or other business justifications.

There Already Exists Extensive Protections For Employee Benefits Under ERISA And Specific Amendments to the ADEA

The proponents of H.R. 3200 similarly would have this Committee believe that § 4(f)(2) provides the only protection for older employees in the area of employee benefit plans -- another faulty premise. The most comprehensive law regulating employee benefit plans is, of course, ERISA. In ERISA, Congress has expressly prohibited employers from excluding employees from pension plans merely because those employees have attained a certain age. 29 U.S.C. § 1052(a)(2).

Moreover, Congress has also amended the ADEA to provide certain specific protection for employees under employee benefit plans. For example, in the 1978 amendment to the ADEA, Congress prohibited employers from using employee benefit plans to retire employees involuntarily because of their age. 29 U.S.C. § 623(f)(2). Furthermore, in a 1982 amendment to the ADEA, Congress required employers with 20 or more employees to offer the same group health plan benefits to employees age 65 and over as are offered to employees under age 65 notwithstanding any additional costs that might be incurred. 29 U.S.C. § 623(g). And, in a 1986 amendment to the ADEA, Congress required employers to continue to accrue pension benefits for employees who continue to work beyond their normal retirement date. 29 U.S.C. § 623(i). Indeed, the 1986 amendment is especially noteworthy because it expressly acknowledges the interface between ERISA and the ADEA, and requires that they be interpreted consistently by the EEOC, DOL, and IRS.

Finally, the marketplace, through collective bargaining and other processes, also provides substantial protection to the employee benefits of older workers. Thus, the Supreme Court in Alessi, supra, recognized the importance of the market and collective bargaining when it held that ERISA pre-empted a state law prohibiting the offset of workers' compensation benefits against retirement pension benefits. And the courts have further recognized that labor unions are not precluded from trading off benefits in the negotiation of collective bargaining agreements. See, e.g., Anderson v. Ideal Basic Industries, 804 F.2d 950 (6th Cir. 1986)(union did not breach duty of fair representation when it negotiated a closedown agreement with company which provided for assured employment for employees, vested pension for hourly employees, and pro-rata vacation pay, but but did not negotiate discontinuation benefits for employees); Chesser v. Babcock & Wilcox, 753 F.2d 1570 (11th Cir.) cert. denied sub nom. 474 U.S. 836 (1987) (duty of fair representation not violated by trade-off of layoff and vacation benefits). There is certainly no basis for assuming that the Supreme Court's decision in Betts will result in any changes to existing employee benefit plans that would adversely affect the interests of older workers.

The Impact of the Betts Decision.

Thus, far from being the overreaching miscreant that upset clearly established law, the Betts decision resolved much of the chaos that resulted from inconsistent administrative and judicial interpretations of the 1970s and 80s. It did so not by judicial activism, as its critics have charged, but by examining and giving effect to the intent of the Congress that passed the ADEA, and the purposes Congress sought to achieve.

As a result, it is now clearly legal for employers to do what they consistently have done. They may integrate their retirement benefits with other employee benefits and with public entitlements so that the limited resources allocable to benefits can be used to protect the greatest number of employees. They can continue to provide for early retirements and may offer early retirement incentive programs to employees in an effort to resolve in a humane way the problems associated with the need to downsize in response to economic conditions. They may employ actuarially driven factors to assure -- to the extent humanly possible -- that benefits promised to last an employee's lifetime will have been sufficiently funded to do so.

By contrast, were this legislation to become law, employers would be required to duplicate benefits by providing severance or disability "contingency benefit" payments in addition to generous retirement benefits. This would result in either a reduction in future increases in pension benefits or a reduction in the amount of severance or disability benefits to all workers. The legislation could also be interpreted to disapprove of some uses of actuarial data, contrary to sound and necessary benefit practice; if so, it would disrupt numerous pension and insurance programs. Finally, the legislation would also appear to require an employer to provide the same early retirement benefit to each employee, regardless of age. The dissipation of the limited resources available in situations in which early retirement programs are most likely to be offered to a large segment of the workforce would make such a program uneconomical. The incentive might have to be so low that it would not provide the necessary incentive. If the program failed as a result, involuntary layoffs may be the only alternative available.

If the cost-justification method is adopted as the exclusive method of justifying age differentials in benefit plans, and if benefit integration and use of actuarial data is limited or eliminated, employers will be required to shift benefit dollars at the expense of older workers. Because employers have but a limited amount of resources available to spend on employee benefits, the price of legislation will be paid in large by older workers -- either by a loss of existing benefits (e.g. severance pay) or a reduction in future benefits (e.g., pensions).

This will also result in an increase in the cost of hiring and retaining older workers. In 1967, the drafters of the ADEA feared that the cost of benefits for older workers would act as a disincentive to employ them. For this reason, they exempted employee benefit plans. This legislation creates even greater disincentives than the drafters could have imagined, and could cause their fears to be realized.

Finally, all of the problems of this legislation are only compounded by the provision making it retroactive. Given the conflicting interpretations that existed prior to Betts, it is astounding that this bill would seek retroactively to reverse decisions affected by Betts and to render unlawful actions and practices that existed prior to the enactment of the legislation. To attempt to do so is fundamentally unfair and constitutionally suspect.

Conclusion

In conclusion, H.R. 3200 proceeds from a flawed premise. The proposed legislation neither comports with nor restores the original intent of Congress in enacting the ADEA. There has been no consistency in agency interpretation of § 4(f)(2). And the courts have never spoken with one voice in construing this section. The bill, if enacted, would place in jeopardy both generally accepted benefit plan designs and practices that were based on actuarial assumptions and widely used coordinated benefit programs, many of which have resulted from collective bargaining. It would also result in the elimination of many early retirement programs. Thus, the older workers that we all want to protect would be best served by the defeat of H.R. 3200.

APPENDIX A

DESCRIPTION OF GROUPS PRESENTED

Association of Private Pension and Welfare Plans

The Association of Private Pension and Welfare Plans ("the APPWP") is a private, non-profit organization whose primary purpose is to protect and foster the growth of this country's private pension and employee benefit system. The APPWP was founded in 1967, and has grown since that time to represent hundreds of plan sponsors, both large and small, as well as plan support organizations such as actuarial and benefit consulting firms, investment firms, banks, insurance companies, accounting firms, and other professional benefit organizations. Collectively, the APPWP's members have substantial experience in the entire spectrum of issues relating to all types of benefit plans. APPWP members either sponsor plans themselves or provide assistance to more than 70,000 benefit plans; these plans collectively cover tens of millions of employees.

National Association of Manufacturers

The National Association of Manufacturers ("NAM") is a voluntary business association of more than 13,500 member companies and subsidiaries, large and small, located in every state. Members range in size from the very large to more than 9,000 smaller manufacturing firms, each with fewer than 500 employees. NAM member companies employ 85 percent of all workers in manufacturing and produce more than 80 precent of the nation's manufactured goods. NAM is affiliated with an additional 158,000 businesses through its Associations Council and the National Industrial Council.

Chamber of Commerce of the United States

The Chamber of Commerce of the United States ("the Chamber") is the world's largest federation of business companies and associations. It represents approximately 180,000 businesses of every type throughout the country, plus several thousand organizations and trade associations.

ERISA Industry Committee

The ERISA Industry Committee ("ERIC") is an association of more than 120 of the nation's largest employers. ERIC's members provide a wide variety of employee benefits under a multitude of broad-based employee benefit plans. These plans provide such benefits as health and life insurance, disability income, sick pay, severance pay, and retirement income. Employer-sponsored plans have been remarkably successful in efficiently allocating limited employer resources to meet the important and diverse needs of a large and heterogeneous workforce. More than 25 million Americans are covered by ERIC's members' plans. Many of these plans are maintained pursuant to collective-bargaining agreements.

Mr. Martinez. Thank you, Mr. Dichter. Now we will hear from Mr. Mackaronis.

STATEMENT OF CHRISTOPHER MACKARONIS, ATTORNEY AT LAW, BELL, BOYD & LLOYD

Mr. Mackaronis. Good morning, Mr. Chairman and members of the committee. I am pleased to be here today. My name is Christopher Mackaronis. For more than 10 years now my practice of law has been almost exclusively in the Age Discrimination Employment Act, with particular emphasis on employee benefit plans and the affirmative defense set forth in Section 4(f)(2) of the law. I learned my trade as a staff attorney with the Office of Legal Counsel at the EEOC where, from 1979 to 1985, I had primary staff responsibility for age discrimination regulations as well as policy development.

I have been the manager of advocacy programs with the American Association of Retired Persons, and I am currently a partner in the Washington office of the Chicago law firm of Bell, Boyd and Lloyd. I have participated in numerous employee benefits cases under Section 4(f)(2), and in particular, relevant to the comments already made by this morning's panel. I represented the plaintiffs in the Cipriano case, and I also participated in Karlen, a case decided in the Seventh Circuit.

I have only a couple of points to make for you today, and I ask that my written remarks be submitted for the record.

First, Mr. Chairman, from a practitioner's point of view, I think it is pretty obvious that Betts is extremely ominous for older workers. Under Betts, employers can specifically target older workers for benefit reductions, particularly when faced with the need to cut benefit costs. Now, as the committee already knows, June Betts has already succumbed to an erroneous interpretation issued by the court in Betts, but there are far others out there who will no doubtedly have their benefits cut in the future if the Supreme Court's interpretation in Betts is permitted to stand.

Ironically, indeed, it was employer costs that motivated the late Senator Jacob Javits to introduce Section 4(f)(2) in 1967. Since that time, for more than 20 years, the concerns of Senator Javits and those voiced by the other Members of the Congress in 1967, as well as 1978, have been embodied in what has now been rejected, what was called the Equal Benefit or Equal Cost Regulation.

The principle was a very simple one, Mr. Chairman. As far as I am concerned, it was a win/win proposition for both employees and employers. Under the equal benefit or equal cost principle employees were protected from arbitrary age discrimination in employee benefits. Under the same principle, however, employers were protected from incurring undue cost on behalf of older workers. Indeed, the 4(f)(2) exception permitted employers to discriminate so long as that discrimination was justified by age-related costs.

Unfortunately, the decision in Betts has overturned this very careful balance that Congress struck and which has been embodied in administrative regulations for almost 20 years. It is my view that H.R. 3200 would restore this careful balance in affect for that long time. Nevertheless, Mr. Chairman, critics of H.R. 3200 have raised numerous objections, two of which I would like to address today, and if I may, I would like to approach the easel to do so. I wanted this to be slightly larger print but I hope everybody can read it as I go through it.

The first point I want to address is one that has already cropped up today with some frequency regarding early retirement incentives. Now, what I think, and I cannot help but get the inescapable impression, Mr. Chairman and members of the committee, that this whole notion, and the tactic here is to complicate matters rather than to simplify them. Through these charts, I hope to simplify them a little bit, and let me explain.

There are numerous early retirement incentive benefits which both before the Betts decision and under 3200 would be lawful without any special provision in the law other than the way 3200 is currently written. First, a flat dollar amount. That was always lawful under Betts. It would be lawful under 3200. It is fine. A service-based early retirement incentive, where each participating employee is granted an additional 5 years, for instance, or excuse me, where service times a dollar figure is included in somebody's pension. That was lawful pre-Betts and would be lawful under 3200. A percentage of salary, that was always lawful as well pre-Betts, under 3200. And retiree health. If you promise to give retiring employees retiree health in perpetuity in exchange for their voluntary resignation, that was lawful pre-Betts and under 3200. Four benefits, by no means exclusive, which were permissible before and would be permissible after under the language of 3200.

Pension benefits. Mr. Gunderson, you asked several questions about pension benefits. The confusion is that sometimes employers offer early retirement incentive benefits as part of a pension plan. They always could do that in a nondiscriminatory fashion pre-Betts. They could impute service. It means they give them an extra 5 years, for example. That was lawful; would be lawful under H.R. 3200. They could give an across-the-board increase based on a percentage of pension. Pre-Betts, lawful. Post-Betts, post-3200, lawful. It is fine. A flat dollar increase, perhaps $200 a month to every employee who wanted to leave. Pre-Betts, lawful. Post-Betts, lawful. This is by no means exclusive.

One cannot help be led to the question, what then are we arguing about? Why is it that employers and even the EEOC suggests that the law needs to contain a provision regarding early retirement incentives. The reason is simple: While these are all lawful both before and after, the proponents of those changes want to make provisions which are now unlawful lawful, and they want to use 3200 to do it.

Let me give you two examples. The only two circumstances under which early retirement incentives have ever been denied to older persons have been the explanation that the older people would be retiring anyway. Therefore, we do not want to throw our money away. I litigated Cipriano. The judge in Cipriano held that to be a violation of the law, and as was noted earlier, awarded double damages. That is the law. It would not be changed by 3200.

The other explanation for denying a retirement incentive based on age is in order to force people to leave employment prior to the age at which the benefit is denied. That is Karlen, another case in which I participated. Karlen said you cannot do that. And the reason you cannot is that you cannot deny a benefit which is unrelated to cost in order to force people, or to try to encourage people to give up their right to continued employment. So, I submit to you today, Mr. Chairman and the members of the committee, that 3200 is fine. 3200 would preserve the status quo to a full range of early retirement incentive benefits which were lawful before and would continue to be lawful now. The only question is whether by amendment you want to make the ones that were unlawful before lawful. And I do not believe you do.

The second criticism that I would like to respond to deals with severance benefits. Opponents of 3200 have talked about integration. They call it integration, or coordination, avoiding duplication. Those strike me as confusing terms. So, I have come up with a chart that shows you how integration works.

Severance integration, XYZ Manufacturing. Integration always involves two things: a pension plan and a severance pay plan. The pension plan here is a standard one. Normal retirement at 65, a benefit at 65 of 1 percent times pay times service. The severance benefit says you get weekly pay times your service when you leave, when you are laid off. Unfortunately, this read "no severance if pension eligible" is the coordination provision. It is integration.

How does it operate? Two employees, A and B. A is 45. B is 65. They have got identical service and identical salaries. They are, for the employment discrimination laws, comparably situated. They are both laid off at the same time. What do they get? Benefits after layoff, A gets $400 a month pension at age 65, which is exactly what B gets; the same pension at the same date, exact comparability. But the kicker is, of course, that A gets $10,000 and B gets no severance at all. And the only difference, of course, is their age. Call it what you want. Call it integration, call it coordination, for 20 years the courts, the administrative agency, the Congress, everybody has called this discrimination. 3200 would leave that definition in place.

Now one comment finally. Opponents of the bill suggests integration is okay under ERISA. It should be okay here. They are wrong, because the integration under ERISA is equal. It is not unequal. This $400 a month at 65, if this plan lawfully under ERISA permitted integration, this $400 would be cut to $300, and this $400 would be cut to $300. That is equal. That is not. I will be glad to answer any questions the committee might have.

[The prepared statement of Mr. Mackaronis follows:]

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September 25,1989

Mr. Paul S. Ceja
General Counsel
Select Committee on Aging
U.S. House of Representatives
712 House Annex I
Washington, D.C. 20515

RE: September 21,1989 Hearing

Dear Paul:

Enclosed please find a copy of the written testimony which I prepared in connection with my appearance before the House Committee on Aging and the Education and Labor Subcommittees on Employment Opportunities and Labor Managment Relations. I appreciate the invitation to testify and hope that my comments will be of assistance in securing the prompt passage of H.R. 3200.

Sincerely,
Chris
Christopher G. Mackaronis

CGM/sb
cc: James Brudney

I. INTRODUCTION

Good morning Mr. Chairman. My name is Christopher Mackaronis. I appreciate the opportunity to testify before the Select Committee on Aging, and the House Education and Labor Subcommittees on Employment Opportunities and Labor Management Relations.

For more than ten years, the vast majority of my legal practice has involved the Age Discrimination in Employment Act of 1967, "ADEA", with particular emphasis on the exception for employee benefit plans set forth in § 4(f)(2) of the Act. From 1979 through 1985, I was the Senior Staff Attorney in the Office of Legal Counsel at the Equal Employment Opportunity Commission (EEOC), with primary responsibility for ADEA regulations and policy development. In that regard, I was responsible for the review and development of all the interpretations and regulations which were in effect at the time jurisdiction over the ADEA was transferred from the Department of Labor to the Equal Employment Opportunity Commission on July 1, 1979. From March 1985 through August 1989, I was the Manager of Advocacy Programs in the Worker Equity Department at the American Association of Retired Persons (AARP). I am currently a partner in the Washington, D.C. office of the Chicago law firm of Bell, Boyd & Lloyd.

I have been involved in numerous lawsuits under the ADEA involving the § 4(f)(2) affirmative defense.

Specifically, I have been involved in *Public Employees Retirement System of Ohio* v. *Betts*, 109 S. Ct. 2854 (1989); *EEOC* v. *Westinghouse Electric Corp.*, 869 F. 2d 696 (3d cir. 1989); *EEOC* v. *Cargill, Inc.*, 855 F.2d 682 (10th Cir. 1988); *Britt* v. *E.I. du Pont de Nemours & Co., Inc.*, 768 F. 2d 593 (4th Cir. 1985); *Karlen* v. *City of Colleges of Chicago*, 837 F. 2d 314 (7th Cir. 1988); *VonAulock* v. *Smith*, 720 F. 2d 176 (D.C. Cir. 1983); *American Ass'n of Retired Persons* v. *EEOC*, 823 F. 2d 600 (D.C. Cir. 1987); *American Ass'n of Retired Persons* v. *Farmers Group, Inc.*, 10 E.B.C. [BNA] 1121 (C.D. Cal. 1988); *Abenante, et al.* v. *Fulflex, Inc.*, 48 Fair Employ. Prac. [BNA] Cases 918 (D.R.I. 1988), *appeal pending*, No. 89-1179 (1st Cir.); and *Mitchell* v. *Mobil Oil Corp.*, *appeal pending*, No. 89-1019 (10th Cir.). Moreover, I have in the past or am currently representing plaintiffs in the litigation of the following early retirement incentive cases under the ADEA: *Cipriano* v. *Board of Education of North Tonawanda*, 785 F. 2d 51 (2d Cir. 1986), *on remand*, 700 F. Supp. 1199 (W.D.N.Y. 1988); *Paolillo* v. *Dresser Industries*; 865 F. 2d. 37 (2d cir. 1989), and *AARP, et al.*, v. *E.I. duPont de Nemours & Co., Inc.*, No. 86-6866 (E.D.Pa.).

In my testimony today, I will attempt to focus on the effects of the Supreme Court's decision in *Public Employees Retirement System of Ohio* v. *Betts*, 109 S.Ct. 2854 (1989), and the manner in which the "Older Workers Benefit Protection Act," H.R. 3200, would effect the pre-*Betts* law under the ADEA regarding employee benefit plans.

II. Public Employees Retirement System of Ohio v. Betts

In Public Employees Retirement System of Ohio v. Betts, 109 S.Ct. 2854 (1989), the Supreme Court substantially changed a variety of settled interpretations of the ADEA regarding employee benefit plans. As a result of Betts, employers will undoubtedly argue that they have far greater latitude than ever before to discriminate in the terms and conditions of virtually all forms of employee benefits.

First, the Court concluded in Betts that the phrase "compensation, terms, conditions, or privileges of employment" set forth in § 4(a)(1) of the ADEA does not encompass employee benefit plans.[1/] The Court stated that to conclude otherwise "would in effect render the § 4(f)(2) exemption nugatory with respect to post-Act plans." 109 S.Ct. at 2866.[2/] The Court's

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[1/] Section 4(a)(1) of the ADEA reads as follows:

> It shall be unlawful for an employer -- (1) to fail or refuse to hire or discharge an individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age;...

29 U.S.C. § 623(a)(1).

[2/] Section 4 (f)(2) of the ADEA states that it shall not be unlawful:

> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan which is not a subterfuge to evade the purposes of this act...

29 U.S.C. §623 (f)(2).

conclusion in this regard is remarkably unlike its interpretations of virtually identical language in Title VII of the Civil Rights Act of 1964. Under Title VII, the Court has not hesitated to rule that the comparable provision, § 703(a)(1), encompasses the type of employee benefits challenged in Betts. See e.g., Arizona Governing Committee v. Norris, 463 U.S. 1073, 1079 (1983); Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978).

Second, the Court ruled that § 4(f)(2) provides a broad exemption for employee benefit plans under "the ADEA so long as the plan is not a method of discriminating in other, nonfringe-benefit aspects of the employment relationship...." 109 S.Ct. at 2866. In effect, the Court ruled that in addition to demonstrating disparate employee benefits, in order to establish a violation of the ADEA a plaintiff would also have to demonstrate some other form of discrimination in the "non-fringe benefit aspects of employment" in order to establish a violation of the ADEA. This new formulation of the plaintiff's burden in an employee benefits case -- benefits discrimination plus non-fringe benefits discrimination -- is inconsistent with the standards previously applied by all the courts of appeals in addressing benefits discrimination issues under the ADEA[3].

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[3] See e.g. Betts v. Hamilton County Board of Mental Retardation, 848 F.2d 692 (6th Cir. 1988); EEOC v. City of Mt. Lebanon, 842 F.2d 1480 (3d Cir. 1988); Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir. 1988); Cipriano v. Board of Education of North Tonawanda School District, 785 F.2d 51 (2d Cir. 1986); EEOC v. Westinghouse Electric Corp., 725 F.2d 211 (3d Cir. 1983), cert. denied, 469 U.S. 820 (1984); EEOC v. Bordens Inc., 724 F.2d 1390 (9th Cir. 1984); Mason v. Lister, 562
(footnote continued)

Third, the Court rejected regulations, in effect since 1969, which imposed a "cost justification requirement" to benefit reductions under the § 4(f)(2) defense. The dual predicate for the Court's rejection of these regulations was the Court's conclusion that they were "contrary to the plain language of the statute," 109 S.Ct. at 2865, and that "the cost justification requirement was not adopted contemporaneously with the enactment of the ADEA." 109 S.Ct. at 2863. With regard to the latter conclusion, the Court held that although the "cost justification" first appeared in 1969, subsequent regulations impermissibly narrowed what had previously been "a non-exclusive objective test for employers" to an exclusive cost-based analysis. 109 S.Ct. at 2863.

Finally, the Court in Betts rejected the unanimous judgment of the courts of appeals that § 4(f)(2) constituted an affirmative defense, a defense for which the employer bore the burden of proof. The Court ruled that "the employee bears the burden of proving that the discriminatory plan provision actually was intended to serve the purpose of discriminating in some nonfringe-benefit aspect of the employment relationship." 109 S.Ct. at 2868.

Needless to say, the holding in Betts substantially alters the legal burdens under which plaintiffs can pursue allegations of discrimination in employee benefit plans under the ADEA. Numerous cases currently on file could be adversely

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F.2d 343 (5th Cir. 1977).

affected by Betts. In fact, as Justice Marshall noted in his dissent, even in pending cases where the employer's only explanation for discriminatory benefit design is "his abject hostility to, or his unfounded stereotypes of [older workers]," 109 S. Ct. at 2869 (Marshall, J. dissenting), the employer may prevail unless the employee can demonstrate that the discriminatory plan design was intended to cause some other nonfringe-benefit discrimination.

While the effect of Betts on pending cases is, in the long run, quantifiable, it will also have secondary effects which are far less measurable. If the standards set forth by the Court in Betts are allowed to remain in effect, Congress should anticipate the elimination of almost all employee benefit litigation under the ADEA. Under the Court's "benefits discrimination plus" formulation, prudent counsel will be forced to search for direct evidence of an employer's "intent" to discriminate in a nonfringe-benefit aspect of employment prior to instituting litigation. As all seasoned practitioners know, however, it is precisely these forms of direct evidence, i.e., "smoking guns", that are most difficult to find. It would be the rare employer who announces his intention to use benefits discrimination as a means of accomplishing some other unlawful objectives. Ironically, under the Court's formulation in Betts. all the employer need announce is that he has specifically targeted older workers for cost savings under any benefit programs.

Ultimately, the result reached by the Court in Betts was neither mandated by the plain language of the statute nor its legislative history. For more than twenty years, the agencies responsible for enforcing the ADEA have fashioned (and maintained) interpretative regulations which effectively protected both employers and employees in the field of employee benefits. Employees were protected because they could not be singled out as targets of arbitrary discrimination. Likewise, employers were protected by not having to incur undue expense on behalf of older workers, a result which would have discouraged both their hiring and retention. By incorporating this long-standing regulatory concept into the ADEA, H.R. 3200 would restore both fairness and predictability to the whole range of employee benefits under the ADEA. H.R. 3200 would fulfill the long-standing expectations of older workers, while at the same time permitting employers to design benefits programs that would accomplish legitimate business objectives.

III. THE ADEA LEGISLATIVE HISTORY ON EMPLOYEE BENEFIT PLANS

When read together, both the 1967 and 1978 legislative history to the ADEA reflect congressional intent to fashion a limited exception for discrimination in employee benefit plans which is justified by age-related costs for benefits.

A. The 1967 Legislative History

Contrary to the holding of the Court in Betts, the 1967 legislative history of the ADEA cannot be read to reflect an intent to create a wholesale exemption from the Act for all employee benefit plans and all forms of discrimination thereunder. Another interpretation, one which protects employees from arbitrary discrimination and employers from undue expense, is more plausible, particularly in light of subsequent legislative history to the ADEA. Indeed, the 1967 legislative history demonstrates that the exception for employee benefit plans was the result of congressional preoccupation with two related issues -- pension plans and excessive employer expense.

During consideration of the ADEA in 1967, Congress acknowledged that the cost of providing certain benefits to newly-hired older workers can be higher than providing the same benefits to younger workers. The Administration's bill (S.830), however, contained no provisions for the observance of bona fide employee benefit plans. Senator Jacob Javits recognized that this might actually encourage employers not to hire older workers who would have to be included in pension plans and provided with full benefits:

> It [the administration's bill] does not provide any flexibility in the amount of pension benefits payable to older workers depending on their age when hired, and thus may actually encourage employers, faced with the necessity of paying greatly increased premiums, to look for excuses not to hire older workers when

> **they might have hired them under a law granting them a degree of flexibility with respect to such matters.**

Hearings on S.830 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. 27 (1967) (Emphasis added.) Senator Javits proposed the amendment which became § 4(f)(2)[4/] in order to provide employers with the "flexibility" to make necessary distinctions based on age and thereby to ensure that employers would not be "discouraged from hiring older workers because of the increased costs associated with providing benefits to them." S. Rep. No. 723, 90th Cong., 1st Sess. 14, reprinted in Legislative History at 118; Hearings on S. 830 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. 27 (1967); see also EEOC v. Borden's, Inc., 724 F.2d at 1396. Senator Javits explained:

> The meaning of this [§4(f) (2)] provision is as follows: An employer will not be compelled under this section to afford to older workers exactly the same pension, retirement, or insurance benefits as he affords to younger workers.

113 Cong. Rec. 31255 (November 6,1967), reprinted in Legislative History at 146 (emphasis supplied).[5/]

[4/] 113 Cong. Rec. 7076 (March 16,1967), reprinted in Legislative History at 71.

[5/] See also S. Rep., No. 723, 90th Cong., 1st Sess. 4 (1967) ("This exception serves to emphasize the primary purpose of the bill---hiring if older workers---without necessarily including such workers in employee benefit plans."); remarks of Senator Yarborough (amendment will not deny older workers employment but will "limit [their] rights to obtain full consideration" in benefit plans) 113 Cong. Rec. 31255 (November 6,1967), reprinted
(footnote continued)

Despite these specific legislative concerns, however, the Court in Betts chose to rely on isolated references to permissible "exclusions" to effectively exempt all employee benefits from coverage. See 109 S.Ct. at 2867. The Court's reading unnecessarily broadened the statutory exception.

First, the 1967 discussions concerning exclusions uniformly pertained to plans which excluded employees from participation at the date of hire, not to plans like the one challenged in Betts, which exclude all employees based on age, regardless of service. There is not a shred of legislative history showing that Congress intended to permit employers to deprive long-service employees of benefits upon the attainment of an arbitrary age.

Second, mention in 1967 of exclusions from employee benefit plans clearly pertained to pension plans. Indeed, those references manifest congressional intent not to force employers to include in a pension plan newly hired older workers who could not possibly meet the vesting requirements of those plans and whose inclusion would unduly disrupt the actuarial and cost expectations under which the plans operated. See Remarks of Senator Yarborough, 113 Cong. Rec. 31255 (1967), reprinted in

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in Legislative History at 146 (emphasis supplied); remarks of Representative Daniels (§4(f)(2) "is designed to maximize employment possibilities without working an undue hardship on employers in providing special and costly benefits.") 113 Cong. Rec. 34746 (December 4, 1967), reprinted in Legislative History at 157 (emphasis added).

Legislative History at 146; see also Alford v. City of Lubbock, **604 F.2d 1263, 1270 (5th Cir.),** cert. denied, **456 U.S. 975 (1982).**

Furthermore, the exclusions referred to in the 1967 legislative history were later narrowly drawn by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1052(a)(1)(B) (employees can only be excluded from defined benefit pension plans, and then only if hired within five years of the normal retirement age in the plan). The limited exclusions in ERISA were adopted by regulation to apply all employers covered by the ADEA, 29 C.F.R. §860.120 (f)(1)(iv)(A) (1979). In 1986, Congress amended the ADEA and ERISA to prohibit, inter alia, the exclusion of any employee from a pension plan based on age at date of hire. See Pub. L. No. 99-509, § 9203(a), 100 Stat. 1979 and H.R. Conf. Rep. No. 1012, 99th Cong., 1st Sess. 379 (1986) (overall objectives of these amendments is to assure that employee benefit plans do not discriminate on the basis of age).

Ultimately, the Court's holding in Betts undermined rather than furthered the purposes of the ADEA. While sparing employers from the "undue expense" about which Congress was concerned, the Court has excused employers from incurring any expense at all, a result which promotes precisely those forms of arbitrary discrimination the statute was designed to eliminate. See 29 U.S.C. §621 (b) ("It is therefore the purpose of this Act...to prohibit arbitrary age discrimination in employment").

Not only is this result inconsistent with the 1967 legislative history, it also flatly contradicts the unanimous and unequivocal expressions of congressional intent in 1978.

B. The 1978 Legislative History

In passing the 1978 amendments to the ADEA, Congress dispelled any doubt about whether a "cost Justification" was required to satisfy the standards of §4(f)(2). Managers of the 1978 amendments and other members of Congress repeatedly and specifically endorsed the understanding that §4(f)(2) sanctioned only those forms of discrimination in benefits that were justified by age-related costs. Senator Javits, while addressing the proposed amendment of §4(f)(2), reaffirmed his original intent in proposing §4(f)(2):

> The purpose of § 4(f)(2) is to take account of the increased cost of providing certain benefits to older workers as compared to younger workers.
>
> Welfare benefit levels for older workers may be reduced only to the extent necessary to achieve approximate equivalency in contributions for older and younger workers. Thus a retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.

124 Cong. Rec. 8218 (March 23,1978), reprinted in Legislative History at 539 (emphasis supplied); see remarks of Senator Williams, Majority Manager of ADEA amendments ("[Javits] statements are consistent with the position taken by the Department of Labor regarding these matters.") Id.; See also remarks of Senator Williams ("§ 4(f)(2) was intended to permit...varying coverage of workers in different age groups to reflect those [cost] differences so long as they are based on valid assumptions...") 123 Cong. Rec. 34295 (October 19,1977), reprinted in Legislative History at 482.

The statements of managers and other legislators from the House confirmed that § 4(f)(2) authorizes only reductions in benefits necessitated by costs. Remarks of Rep. Hawkins ("the purpose of § 4(f)(2) is to encourage the employment of older workers by permitting age-based variations in benefits where the cost of providing benefits to older workers is substantially higher.") 124 Cong. Rec. 7881 (March 21, 1978), reprinted in Legislative History at 528. Furthermore, they noted that the exception does not authorize precisely the type of total cutoff of benefits challenged in Betts. Remarks of Rep. Weiss ("it is not the intention of this amendment to have older workers cut off from their health and benefit plans the day they reach age 65...[employers] should not interpret the 1977 (sic) amendments to the ADEA as a license to cease to provide reasonable benefits to their older employees.") 124 Cong. Rec. 7887 (March 21, 1978), reprinted in Legislative History at 534.

This overwhelming (and uncontradicted) body of congressional commentary delimiting the requirements of §4(f)(2) was disregarded by the Court in Betts, however, on the grounds that the 1978 Congress did not amend the "subterfuge" proviso. See 109 S.Ct. at 2861. Regardless of the merits of that holding,[6] it would have been extraordinary for Congress to amend a provision in 1978 which for almost ten years had been defined by the enforcing agency in a manner consistent with Congressional intent. In fact, the 1978 Legislative history to the ADEA reflects uniform agreement with the "equal benefit or equal cost" principle set forth in the Department of Labor's 1969 interpretation of § 4(f)(2).

IV. THE "EQUAL BENEFIT OR EQUAL COST" PRINCIPLE

A. The 1969 Department of Labor Interpretation

Shortly after passage of the ADEA, the Department of Labor, which then had responsibility for enforcement of the ADEA, interpreted the "subterfuge" provision of § 4(f)(2) to permit age-based differences in employee benefits where justified by valid cost considerations. This 1969 interpretation articulated an "equal benefit or equal cost" principle as follows:

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[6] As the Court noted in Betts, the 1978 amendments added language to §4(f)(2) specifically prohibiting involuntary retirements while several Congressmen, including Senator Javits, made it clear that Congress specifically disagreed with the holding and reasoning of the Court in McMann. 109 S. Ct. at 2861 citing 124 Cong. Rec. 8219 (1978) reprinted in Legislative History at 519.

> **A retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.**

29 C.F.R. § 860.120 (a), 34 Fed. Reg. 9709 (June 21, 1969); See EEOC v. Borden's, Inc., 724 F.2d at 1396. As a contemporaneous construction of the statute by the enforcement agency, the "equal benefit or equal cost" principle was entitled to great deference by the courts. EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 600 n.17 (1981); Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 210 (1972); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); United States v. Jackson, 280 U.S. 183, 196-97 (1930). Significantly, not one of dozens of formal opinion letters issued by the DOL between 1969 and 1978 ever deviated from the "equal cost" approach to a claim of discrimination in employee benefits.

B. The 1979 Interpretative Bulletin

The Senate Report accompanying the 1978 amendments (the first amendments to § 4(f)(2) since passage of the Act) implicitly embraced the existing "equal cost' interpretation of § 4(f)(2) by declaring:

> **This bill would not alter existing law with respect to these practices. Existing principles of law, including the 4(f)(2) bona fide employee benefit plan exception, as modified by these amendments, would be the standard by which these practices will be evaluated.**

S. Rep. No. 493, 95th Cong., 1st Sess. 5, reprinted in Legislative History at 438 (emphasis added). Perhaps more to the point, the bill's managers in both the House and Senate and other Legislators specifically recited the "equal cost" standard with approval as the proper interpretation of § 4(f)(2) See ante at 15-17.

After the passage of the 1978 amendments, the Department of Labor responded to congressional requests for more comprehensive guidance regarding § 4(f)(2)[7] by issuing an amendment to its Interpretative Bulletin on Employee Benefit Plans, 29 C.F.R. § 860.120, 44 Fed. Reg. 30648 (May 25,1979). The amendment, which specifically relied on the extensive 1978 legislative history, continued in effect the "equal benefit or equal cost" principle previously enunciated by the Department and endorsed by Congress.[8] The detailed regulation and the accompanying explanatory material made several relevant points absolutely clear.[9] First, while the regulation provided an in-depth discussion of four of the most common types of employee benefit plans---group term life insurance, group health insurance, long-term disability, and retirement plans (29 C.F.R. §§860.120(f)(2) (i)-(iv)), it was patently clear that the "equal benefit or equal cost" principle applied to all employee benefit plans covered by § 4(f)(2).[10]

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[7] See remarks of Rep. Hawkins, 124 Cong. Rec. 7881 (March 21,1978) reprinted in Legislative History at 529; remarks of Senators Williams and Javits, 124 Cong. Rec. 8219 (March 23,1978) reprinted in Legislative History at 540 ("[t]he Department of Labor intends to promulgate comprehensive regulations in order to provide guidance in this regard for sponsors of employee benefit plans, and the Secretary is urged to act as soon as possible").

[8] The amendment to the Interpretative Bulletin provided:

> The legislative history of this provision indicates that its purpose is to permit age-based reductions in

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> employee benefit plans where such reductions are justified by significant cost considerations...where employee benefit plans do meet the criteria in section 4(f)(2), benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. *A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker* even though the older worker may thereby receive a lesser amount of benefits or insurance coverage. 29 C.F.R. § 860.120(a)(1).

[9] Effective July 1, 1979, Congress transferred enforcement authority over the ADEA from the Department of Labor to the EEOC. Reorg. Plan No. 1 of 1978, 3 C.F.R. § 321 (1978), *reprinted in*, 92 Stat. 3781 (1978). The relevant DOL regulations were not changed by the EEOC. The were continued in effect by the EEOC in 1979, 44 Fed. Reg. 37974 (June 29,1979), and were recodified at 29 C.F.R. § 1625.10, 52 Fed. Reg. 23811 (June 25,1987).

[10] *See* 29 C.F.R. § 860.120 (a)(1) ("where *employee benefit plans* do meet the criteria in section 4(f)(2)...") (emphasis added); (A *benefit plan* will be considered in compliance with the statute where the actual amount of payment made, or cost incurred... is equal...") (emphasis added); *see also* 44 Fed. Reg. 30653 (Although not specifically discussed herein, *other plans within section 4(f)(2)*, such as short term disability and accidental death and dismemberment *are subject to the same general principles*") (emphasis added).

Second, the regulations reaffirmed the intent of the original "equal benefit or equal cost" principle by specifying that the only cost relevant to the issue of "subterfuge" was *the cost of the challenged benefit*. Under a heading entitled "Subterfuge" the regulations stated:

> (1) *Cost data - General*. Cost data used in justification of a benefit plan which provides lower benefits to older employees on account of age must be valid and reasonable. *This standard is met where an employer has cost data which show the actual cost to it of providing the particular benefit (or benefits) in question over a representative period of years.*

29 C.F.R. § 860.120 (d)(1) (emphasis added); *see also* 44 Fed. Reg. 30653 (May 25, 1979) ("Under the benfit-by-benefit approach, as outlined above, *reductions in the level of one benefit* -- such as group term life insurance --*must be justified by an increase in the cost of that particular benefit*, regardless of any adjustment in the levels of other benefits.") (Emphasis added).

Third, the regulations declared only "one exception to the otherwise uniform rule under § 4(f)(2) that age-based reductions in employee benefit plans must be justified by actuarially significant cost considerations." 44 Fed. Reg. 30649; *see* 29 C.F.R. §§ 860.120(f)(1)(iv)(B)(1)-(7) (1979). That exception, which interpreted the ADEA to permit employers to incur no pension costs for certain employees, has since been legislatively rescinded. Section 4(i) of the ADEA, Pub. L. No. 99-509, § 9201.

Despite the almost verbatim continuity between the 1969 interpretation and its 1979 progeny, the Court in Betts held that the "original version of the cost-justification rule was nothing more than a safe-harbor" which, in 1979, was impermissibly transformed into the "exclusive means of escaping classification as a subterfuge." 109 S.Ct. at 2863. While this fundamental change did not affect the treatment of discrimination in employee benefits, it accurately reflected the fact that a whole genre of § 4(f)(2) cases --those involving allegations of involuntarily retirement --had been eliminated by the 1978 amendments.

Up until 1978, there were two generic types of cases to which § 4(f)(2) applied. The exception applied to traditional claims of discrimination in employee benefits. The exception also applied to claims of involuntarily retirement pursuant to a "bona fide" pension or retirement plan. To disprove "subterfuge" in a benefits discrimination case, an employer had to demonstrate a correlation between age and benefit cost consistent with the 1969 interpretation. Since the "equal cost" principle was inapplicable in an involuntary retirement case, an employer could disprove "subterfuge" by more generalized proof of its subjective intent. See e.g. 109 S.Ct. at 2863. It was not surprising, therefore, that while the "equal cost" principle applied to benefits discrimination, it was not the "exclusive means of escaping classification as a subterfuge."

By eliminating the entire spectrum of mandatory retirement cases in 1978, Congress narrowed the scope of the §4 (f)(2) exception to cases involving benefits discrimination.

As has been the rule since 1969, the only method of disproving benefits discrimination has been the objective standard embodied in the "equal benefit or equal cost" principle.

V. THE PROPOSED LEGISLATION: H.R. 3200

In response to the decision in Betts, legislation to amend the ADEA has been introduced in both the House of Representatives and the Senate. In the House of Representatives, H.R. 3200 was introduced on August 4, 1989, by Congressman Edward R. Roybal (D-Ca.), Chairman of the House Select Committee on Aging, along with co-sponsors Augustus Hawkins, William Clay, Mathew Martinez and James Bilbray. H.R. 3200 is identical to S.1511, introduced the previous day (August 3, 1989) in the Senate.[11]

H.R. 3200 would amend the ADEA in several important respects to either modify, or overturn altogether, the holding and legal analysis contained in Betts. First, § 3 of H.R. 3200 would define the term "compensation, terms, conditions, or privileges of employment" under § 11 of the ADEA. This amendment would make it clear that § 4(a)(1) of the ADEA prohibits discrimination in all aspects of the employment relationship, including the provision of virtually all forms of employee benefits. This provision would overturn the Betts holding that § 4(a)(1) does not, like its counterpart under Title VII, broadly

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[11] In the Senate, S.1511 was co-sponsored by Senators Pryor, Jeffords, Metzenbaum, Kennedy, DeConcini and Bumpers.

prohibit discrimination in employee benefits. Since the prohibitions of § 4(a)(1) of the ADEA and § 703(a)(1) of Title VII are in haec verba, this definitional section would ensure that they are similarly construed by courts. Prior to Betts, the courts of appeals had uniformly applied § 4(a)(1) to age-based distinctions in employee benefit plans. See e.g., EEOC v. City of Mt. Lebanon, 842 F.2d 1480 (3d Cir. 1988); Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir. 1988); Cipriano v. Board of Education of North Tonawanda School District, 785 F.2d 51 (2d Cir. 1986); Crosland v. Charlotte Eye, Ear & Throat Hospital, 686 F.2d 208 (4th Cir. 1982).

Second, § 4 of H.R. 3200 would amend § 4 of the ADEA, 29 U.S.C. § 623, to rewrite the exception for bona fide employee benefit plans. The proposed provision, 29 U.S.C. § 623(f)(2)(B), would replace the subterfuge language of § 4(f)(2) with the "equal cost" requirements set forth in the administrative regulations for almost twenty years. The new provision would specifically incorporate the limitations applicable to benefits and the "benefit package" approach set forth in 29 C.F.R. §1625.10 "as in effect on June 22, 1989." That same section of H.R. 3200, § 4, would also shift the burden of proof to the employer to demonstrate that the challenged action met the requirements of the new affirmative defense. Here again, the legislation would restore the universal understanding of the courts of appeals prior to Betts, viz. that § 4(f)(2) was an affirmative defense to which the employer bore the burden of proof. See e.g., EEOC v. City of Mt. Lebanon, 842 F.2d at 1263; Karlen v. City Colleges of Chicago, 837 F.2d at 318; Cipriano v. Board of Education of North Tonawanda, 785 F.2d at 57-59.

Fourth, H.R. 3200 amends § 4 of the ADEA to add a new subparagraph "k" which states that both seniority systems and employee benefit plans "shall comply with this act regardless of the date of adoption of such system or plan." Consistent with the 1978 legislative history accompanying the elimination of mandatory retirement, the purpose of this provision is to make absolutely clear that the requirements of the ADEA apply to all employee benefit plans and seniority systems, including those which were instituted prior to the 1967 enactment of the Act. Although Congress unequivocally announced its intention to accomplish this objective in 1978, the Court in Betts disregarded that legislative history and affirmed its 1977 ruling in United Air Lines v. McMann, 434 U.S. 192 (1977), in which the Supreme Court held that plan provisions which predated the ADEA could not, as a matter of law, constitute a "subterfuge" to evade the purposes of the act.

Finally, H.R. 3200 has an effective date provision (§ 5) which would make its amendments applicable to "all actions or proceedings brought under the [ADEA] after June 23, 1989 and actions or proceedings brought under such act prior to June 23, 1989 which were pending on June 23, 1989." In light of the administrative regulations in effect for almost twenty years, particularly the lengthy interpretations applying the "equal cost" principle to a variety of employee benefits which were issued in 1979, the application of the amended law to cases pending on June 23, 1989 would work no injustice to the business community. Indeed, assuming that an employer was operating in a manner consistent with the long-standing interpretations, the effective date provision in H.R. 3200 should work no hardship at all. Employers in compliance with these long-standing regulations need not change any benefit practices in order to comply with the amended version of the ADEA. On the other hand, employers who have until now disregarded the operative regulations have subjected themselves to the prospect of double damages under the ADEA. See 29 U.S.C. § 626(b).

In addition to the long-standing regulations, the courts of appeals were unanimous in their holdings that employers who provided disparate benefits based on age must satisfy the "equal cost" standards set forth in the existing regulations. See e.g., EEOC v. City of Mt. Lebanon, 842 F.2d 1480 (3d Cir. 1988); Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir.), cert. denied 108 S.Ct. 2038 (1988); Betts v. Hamilton County Board, 848 F.2d 692 (6th Cir. 1988), reversed, 109 S.Ct. 2854 (1989).

VI. OBJECTIONS TO H.R. 3200

Following the introduction of H.R. 3200 (and its identical counterpart in the Senate, S.1511), opponents of the legislation have circulated position statements articulating a variety of arguments why legislation should not be enacted to

overturn the decision in Betts. While this testimony will not attempt to respond in detail to each argument raised, I will attempt to address the principal issues which may be of interest to members of Congress in analyzing the merits of H.R. 3200 and its anticipated effects on both employers and employees covered by the ADEA.

1. The Legislation Would Enact The Status Quo By Incorporating The "Equal Cost" Standard

Critics of H.R. 3200 claim that if Congress enacts the "equal benefit or equal cost" principle into the ADEA, the resulting amendment will substantially narrow the defenses available to employers in benefit discrimination cases. This criticism is unfounded.

From the time the ADEA was passed until 1978, the § 4(f)(2) defense was available in two generic types of employment discrimination claims. First, the defense was available to an employer who, pursuant to the terms of a bona fide pension or retirement plan, mandatorily retired employees based on age. See United Air Lines v. McMann, 434 U.S. 192 (1977).[12/] Second, as discussed infra at 23, § 4(f)(2) has always permitted an employer to justify a benefit reduction by demonstrating that the challenged reduction correlates with an increased cost in a particular benefit. While the courts applied a generalized "business purpose" standard in those cases in which

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[12/] Indeed, as the Court recognized in McMann, prior to the 1978 amendments the Department of Labor took the position that mandatory retirement pursuant the terms of the pension plan was lawful. McMann, 434 U.S. at 197 n.4; see 29 C.F.R. § 860.110(a)(1978).

employees were challenging mandatory retirement, both the administrative agencies and the courts have applied the "equal benefit or equal cost" principal in determining whether a reduction in employee benefits constitutes a "subterfuge" to evade the purposes of the ADEA. Once the entire category of mandatory retirement cases was eliminated by virtue of the 1978 amendments to the Act, the legal standards which remained, applicable only to benefits discrimination cases, continued to be the "equal benefit or equal cost" standards. Contrary to objections raised by opponents of H.R. 3200, the "equal benefit or equal cost" standard has been the only standard throughout the ADEA's history by which an employer can justify benefits discrimination based on age.

B. Age-Based Denials of Severance Benefits Will Continue to Violate the ADEA.

Critics of H.R. 3200 suggest that the enactment of the "equal benefit or equal cost" principle will "outlaw the traditional practice of coordinating retirement plans with other income maintenance contingency benefit programs such as severance pay...." In particular, in commentary circulating regarding H.R. 3200, the Association of Private Pension and Welfare Plans (APPWP) has suggested that "coordination" of severance with pension benefits is a beneficial business practice which allows employers with limited dollars to adequately provide for all employees at the time of layoff. This commentary, and others like it, intentionally overlook two fundamental axioms regarding severance benefits under the ADEA -- that severance "integration" results in substantially greater benefits to younger workers based solely on age and, that the courts of appeals have uniformly held that severance "integration" violates the ADEA.

First, under the rubric of "integration", "coordination", and "duplication", opponents of the bill have glossed over the obvious effects of any practice which offsets severance benefits against pension entitlement. Indeed, a simple example of comparably situated employees at the time of layoff demonstrates the undisputed adverse affects which "integration" has on older workers. Assume, for example, that XYZ Manufacturing Co. is laying off all of its employees at a particular plant location. The company's pension plan has a normal retirement age of 65, at which time a retirement benefit is payable in the amount of 1% X (the employee's monthly salary) X (years of service). Assume as well that XYZ Manufacturing Co. also has a severance pay plan which provides lump sum benefits to laid off employees. At layoff, employees are paid a lump sum which equals their (average weekly pay) X (years of service).

With these standard pension and severance pay plans as an example, the task is then to analyze the manner in which "integration" of these two plans affects comparably situated employees based on their age. Assume, therefore, that employees A and B both have 20 years of service with XYZ, and both have average weekly salaries of $500 ($2,000 per month). The only difference between employee A and Employee B is their age. Employee A is 45 years old, Employee B is 65 years old.

The substantial disparity in their benefits as a result of their layoffs is obvious. Employee A is entitled to a $10,000 lump sum payment immediately upon layoff. The $10,000 represents Employee A's 20 years of service times his average weekly salary of $500. Employee A will also be entitled, at age 65, to $400 per month pension for life. Employee A's pension is computed by multiplying 1% times $2,000 (his average monthly salary) times 20 (his years of service). Thus, as a result of his layoff, Employee A gets a $10,000 lump sum benefit plus a $400 per month pension at age 65.

In stark contrast, Employee B, age 65, receives no benefit whatsoever under the terms of the severance pay plan. This is so because as is the custom with "integration," severance pay is not available to pension-eligible employees at layoff. As a consequence, Employee B is entitled only to a $400 per month pension commencing at age 65. Employee B's pension was computed in identical fashion as that of Employee A, 1% times $2,000 (his average monthly salary) multiplied by 20 (Employee B's years of service). As is readily apparent, both employees get identical pensions at age 65, $400 per month. Employee A, however, because of his age, receives an additional $10,000 lump sum severance payment. Despite the terminology employed by opponents of H.R. 3200 to describe this practice, since the only difference between the two employees is age, the practice of "integration" constitutes impermissible age discrimination. Exhibit A attached hereto demonstrates this point.

Indeed, by resurrecting the concept of "integration" in the context of H.R. 3200, opponents of the bill are attempting to win a battle through this legislative process that they have been unable to win either before the enforcement agency or the courts. Since 1979, the Interpretive Bulletin issued by the Department of Labor (and continued in effect by the EEOC) has prohibited employers from "aggregating" employee benefits with amounts payable under a retirement or pension plan for the purposes of determining compliance with § 4(f)(2). This process of "aggregating" employee benefits, another descriptive term for "integration", was specifically rejected in the regulations as it applied to pension benefits.[13/] See 29 CFR § 1625.10 (f)(2)(ii)(1987) ("A benefit package approach shall not apply to a retirement or pension plan.")

Perhaps more to the point, both courts of appeals to address the issue have concluded that the practice of "integration", which results in the deprivation of severance benefits to pension-eligible employees, violates the ADEA. See EEOC v. Westinghouse Electric Corporation, 725 F.2d 211 (3rd Cir. 1983), cert. denied, 469 U.S. 820 (1984); EEOC v. Westinghouse Electric Corporation, 869 F.2d 696 (3rd Cir. 1989); EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984). As both the Third and Ninth Circuits have recognized, severance pay plans based on

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[13/] Nor is it germane that ERISA permits employers to "integrate" pension benefits with Social Security. In a pension plan that authorized integration both Employees A and B of XYZ Manufacturing (again assuming comparable service and salary) would "lose" the same amount of pension to "integration" at age 65. Since both would be identically affected, the practice sanctioned by ERISA involves no age discrimination.

length of service involve no age-related cost factors which would justify a reduction or denial of severance based on age. Westinghouse II, 869 F.2d at 710; Westinghouse I, 725 F.2d at 224; EEOC v. Bordens, 724 F.2d at 1396.

C. Many Early Retirement Incentives Were Lawful Before Betts And Would Be Lawful Under H.R. 3200.

Critics of H.R. 3200 suggest that the proposed legislation will unduly restrict an employer's ability to offer voluntary early retirement incentive benefits. This argument is a red herring, however. Even before Betts, numerous early retirement incentive benefits were structured in such a way as to comply with the ADEA. These programs, and many others, will continue to be available to employers who want to use early retirement incentive benefits as a means of voluntarily reducing work force size.

Traditionally, employers have offered early retirement incentive benefits in one of several ways. Special lump sum or periodic benefits could be provided as incentives to induce retirement. Alternatively, existing benefits in current pension or retirement plans could be improved for employees willing to depart during a specified period of time, commonly referred to as the "window." Or third, incentive benefits could take the form of some combination of these two categories.

With regard to early retirement incentive benefits which are unrelated to existing benefits programs, there are numerous benefits which can be offered in a nondiscriminatory

fashion. A flat dollar amount (lump sum benefit) might be the most traditional benefit in this category. Prior to Betts, a lump sum benefit offered to all employees age 55 and older did not violate the ADEA, Henn v. National Geographic Society, 819 F.2d 824, 826 (7th Cir. 1987) (severance payment of one year's salary, medical coverage for life, and other benefits), while lump sum benefits specifically denied to employees based on age have been found unlawful. Cipriano v. Board of Education of North Tonowanda, 700 F.2d 1199, 1211 (W.D.N.Y. 1988) (denying $10,000 lump sum benefit to employees over 60 on the grounds they "would be retiring anyway" constitutes arbitrary age discrimination). Like the across-the-board incentive offered to all employees over age 55 in Henn, any similar incentive calculated based on salary or years of service which is offered to employees without regard to age would not violate § 4 of the ADEA. As a consequence, the defense for employee benefit plans does not come into play, either before Betts or under the language proposed in H.R. 3200.

In addition, an employer could offer an early retirement incentive benefit which was calculated based on accumulated sick pay. So long as such a benefit was offered without regard to age to employees eligible for retirement, for example, there would be no violation of § 4(a) of the ADEA. In contrast, however, age-based distinctions in incentives such as these violated the ADEA even before Betts, since they use "age -- not cost or years of service, or salary -- as the basis for varying retirement benefits,...." Karlen v. City Colleges of

Chicago, 837 F.2d 314, 319 (7th Cir. 1988), cert. denied, 108 U.S. 2038 (1988). Likewise, offering free health insurance during retirement would also be a lawful incentive, so long as there were no restrictions based on age. Id.

Moreover, retirement incentive benefits can be provided pursuant to an existing pension or retirement plan in a variety of ways which do not even implicate the prohibitions on age-based distinctions set forth in § 4(a) of the ADEA. For example, as an inducement to retire, an employer could impute an additional five years of service (without regard to age) to employees already eligible for retirement under the pension plan. Such an incentive would provide a non-uniform, but non-discriminatory, increase in the pension benefits of all potential participants based on their current salary and service. Similarly, an employer could provide an across-the-board percentage increase (without regard to age) to all employees already eligible for retirement. Such an incentive would result in non-uniform, but nondiscriminatory, increases for those eligible based on existing pension entitlement. Moreover, a flat dollar approach would also be permissible pursuant to a pension plan, just as it would as an independent benefit.

In addition to the non-pension and pension-type incentives, employers are also free, both before Betts and under H.R. 3200, to use some combination of the two to encourage employees to depart. And, of course, employers need not limit their efforts to their older employees. When faced with the need to cut back, some companies have offered generic "exit incentives" to broad categories of eligible employees regardless of age. Most often provided as a flat dollar amount (lump sum payment), exit incentives frequently accomplish the same business objectives that companies intend to accomplish through use of the more narrowly focused early retirement incentive benefits. The advantage to generic exit incentives is, of course, that since they are not based on age, an employer need not be concerned about benefits discrimination claims under the ADEA.

Legalities aside, generic exit incentive programs avoid the use of dangerous age-based assumptions concerning an employee's expected longevity. In at least one early retirement incentive case, the employer's only explanation for denying the incentive to employees over age 60 was that they "would be retiring anyway." Cipriano v. Board of Education of North Tonowanda, 700 F. Supp. at 1211. Not only is such an age-based assumption impermissible under pre-Betts law, see Leftwich v. Harris-Stowe State College, 702 F.2d 686, 691-92 (8th Cir. 1983); Marshall v. Arlene Knitwear, 454 F. Supp. 715, 728 (E.D. NY 1978), affirmed in part and reversed in part, 608 F.2d 1369 (unpublished opinion), they are unsupported factually. Recent amendments to the Employee Retirement Income Security Act of 1974 ("ERISA") which shortened the mandatory period of vesting to five years were taken in large measure based on congressional recognition of the fact that the U.S. labor force is extremely mobile. Employees change jobs with tremendous frequency and for many reasons, only one of which is to retire. There is simply no practical foundation upon which to assume that older employees are the only group of individuals who can be induced to change jobs when offered large sums of cash or substantially improved retirement benefits. Indeed, anecdotal evidence suggests that older employees are more likely, not less, to remain with their current employer for a longer period of time.

Finally, while the EEOC appears to enthusiastically support the manner in which H.R. 3200 incorporates the "equal cost" principle from the EEOC's regulations, it apparently has some hesitation in applying that same principle to early retirement incentive benefits. This hesitation appeared in the brief which the EEOC filed before the District Court in the retirement incentive case of Cipriano v. Board of Education of North Tonawanda. In that case, the EEOC joined the plaintiffs and the American Association of Retired Persons in arguing that the two plaintiffs, both of whom were excluded from a $10,000 lump sum retirement incentive based on their age (over 60), were entitled to summary judgement and liquidated damages under the ADEA.

Recognizing that the "equal benefit or equal cost" regulations governed the legal standards in the case, see infra at 17 & n.10, the EEOC's Deputy General Counsel recommended to the Commission that the agency's brief declare the challenged plan to be unlawful.[14] The Commision rejected this advice, however, and in it's brief the EEOC intimated that early retirement incentive programs should not be held to the same "equal cost" standard that applies to all other forms of benefit discrimination under the ADEA. This suggestion appears premised on the "voluntary" nature of early retirement incentive plans.[15] The EEOC's "voluntary" distinction is of no legal significance for at least two reasons.

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[14] See Twenty Years of the Age Discrimination in Employment Act: Success or Failure?, Hearing Before the Senate Special Committee on Aging, September 10, 1987, at 579.

First, the "voluntary" distinction has already been rejected by the Supreme Court. In Arizona Governing Committee For Tax-Deferred Annuity And Deferred Compensation Plans v. Norris, 463 U.S. 1073 (1983), the Court specifically held that "the opportunity to participate in [an employee benefit] plan constitutes a condition or privilege of employment." 463 U.S. at 1079. In addressing the defendant's claim that its plan did not violate Title VII because participation in the plan was voluntary, the Court in Norris concluded that "[it] is irrelevant that female employees in Manhart were required to participate in the pension plan, whereas participation in the Arizona Deferred Compensation Plan is voluntary." 463 U.S. at 1081-1082 n.10.

Second, the Second Circuit already rejected the EEOC's suggestion that a prior opportunity to participate in the challenged retirement incentive would have rendered the plan lawful. Contrary to the EEOC's argument, the Second Circuit had already held this consideration to be irrelevant to a determination of whether plaintiffs were unlawfully denied an incentive at the time of their retirement. As the court ruled, "the 'alleged window provision' is not in the record, however, and we would not find it material to our decision if it were, since appellant's claim is not that they were denied the opportunity ever to participate in the incentive, but that they were denied the opportunity to do so on the date they ultimately chose to retire." Cipriano v. Board of Education of North Tonowanda, 785 F.2d at 52 n.2.

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[15] Ironically, the EEOC has never formally litigated a claim of benefits discrimination in an early retirement incentive program, nor has it ever participated as amicus curiae in a retirement incentive case alleging benefits discrimination (other than Cipriano). The absence of EEOC litigation activity in this area presumably has contributed substantially to the dearth of early retirement incentive cases, and has substantially impaired the development of the private bar on claims of this kind.

Similarly, the Seventh Circuit has also flatly rejected the EEOC's novel twist to retirement incentives. In Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir.) (Posner, J.), three professors age 65 and older challenged a negotiated retirement incentive that reduced benefits substantially for employees who worked beyond age 65. The fact that the plantiffs could have retired earlier and received larger benefits was of absolutely no consequence. The College's explanation for the substantial decline in benefits at age 65 was its desire to "induce workers to retire by age 65." As Judge Posner held:

> This strikes us as a damaging admission rather than a powerful defense. To withhold benefits from older persons in order to induce them to retire seems precisely the form of discrimination at which the Age Discrimination in Employment Act is aimed. Rather than offering a carrot to all workers 55 years and older, as in the Henn case, the City Colleges are offerring the whole carrot to workers 55-64 and taking back half for workers 65-69.

Karlen, 837 F.2d at 320. Applying the "equal cost" principle the Court stated that:

> ...where, as in the present case, the employer uses age---not cost, or years of service, or salary---as the basis for varying retirement benefits, he had better be able to prove a close correlation between age and cost if he wants to shelter in the safe harbor of section 4(f)(2). See 29 C.F.R. § 1625.10(a)(1)(d)(1)--(3) (EEOC regulation interpreting section 4(f)(2)).

Id. at 319.

There is a broad range of non-discriminatory retirement incentives successfully used by the business community which would be wholly unaffected by H.R. 3200. What opponents of H.R. 3200 want, however, is to achieve through legislation what they have lost in the courts ---the legalization of age-discriminatory programs. Since the discriminatory programs are based on unlawful assumptions that older workers "would be retiring anyway," see Cipriano v. Board of Education, 700 F. Supp. at 1211, acceptance of that unsupported stereotype could open the floodgates to other discriminatory practices. Indeed, under the same rationale, an employer attempting to increase employee productivity could deny generous bonus payments to older workers because they "would be retiring anyway."

For all these reasons, any early retirement amendment to H.R. 3200 would be inconsistent with the long standing regulations, overturn settled law on early retirement incentives, and heighten the prospects for discriminatory benefits to older workers.

VII. CONCLUSION

The changes proposed by H.R. 3200 are consistent with the ADEA's 1967 and 1978 legislative history, over twenty years of administrative regulations and the vast wealth of judicial authority. They harmonize two critical purposes of the ADEA by outlawing arbitrary age discrimination in employee benefits and at the same time ensuring that employers need not incur undue expense in the hiring and retention of older employees. Restoration of this sensible balance is particularly appropriate now, as vast demographic changes in the U.S. labor force require a re-evaluation of the manner in which the country effectively utilizes older employees. Only by guaranteeing non-discriminatory benefits under the ADEA can we ensure the continued participation of older workers in the labor force.

SEVERANCE "INTEGRATION"

XYZ MANUFACTURING

PENSION PLAN

NORMAL RETIREMENT AGE IS 65

BENEFIT AT 65= 1% x (Ave. Monthly Pay) x (Service)

SEVERANCE PAY PLAN

BENEFIT AT LAYOFF = (Weekly Pay) x (Service)

NO SEVERANCE IF PENSION-ELIGIBLE

EMPLOYEE A	EMPLOYEE B
Age 45	Age 65
20 Years Service	20 Years Service
$500/wk. Pay	$500/wk. Pay

BENEFITS AFTER LAYOFF

$400/mo. Pension at 65	$400/mo. Pension at 65
$10,000 Severance	No Severance

EXHIBIT A

LAWFUL EARLY RETIREMENT INCENTIVE BENEFITS

	PRE-BETTS	H.R 3200
NON-PENSION BENEFITS		
1. Flat Dollar (i.e. $20,000)	X	X
2. Service Based ($1,000 x Years Service)	X	X
3. % Of Salary (50% of Annual Salary)	X	X
4. Retiree Health (For Life)	X	X
PENSION BENEFITS		
5. Imputed Service	X	X
6. % Increase (20% increase)	X	X
7. Flat Dollar Increase ($200 per month)	X	X

EXHIBIT B

Mr. **Martinez.** Thank you very much, Mr. Mackaronis.

We will then go to Mr. Macey.

STATEMENT OF SCOTT J. MACEY, VICE PRESIDENT AND SECRETARY, THE ERISA INDUSTRY COMMITTEE; AND EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, AT&T ACTUARIAL SCIENCES ASSOCIATES, INC.

Mr. **Macey.** Chairman Martinez, Chairman Roybal, and other members of the committee and subcommittees. My name is Scott J. Macey. I appear here today on behalf of the ERISA Industry Committee, commonly known as ERIC. I currently serve as vice president and secretary of ERIC. I am also Executive Vice President and General Counsel of AT&T, Actuarial Sciences Associates. Before I get into my more prepared remarks, I would like to make several prefatory statements.

First of all, I would like to state why I am not here today. I am not here to reargue the Betts case, and I am not here to defend or explain the public employee retirement system and the disability system in the State of Ohio. My purpose in appearing here today, and I appreciate the opportunity to appear, is to explain some of the effects that this proposed bill would have on common practices in the private employee benefit industry.

I would also like to preface my remarks by stating that clearly anyone who has heard the story of June Betts, as we all did this morning, must be sympathetic to and moved by her very unfortunate plight and that of her family. Even if stories like June Betts' occur to a number of people throughout the country, and some corrective action is considered necessary by this committee and subcommittees and other Members of Congress, we do not believe that H.R. 3200 is the appropriate answer.

Finally, I would like to preface my remarks by saying I heard and listened intently to the comments of Professor Clauss and Mr. Mackaronis, and disagree in a number of respects with the various positions taken and statements that they have made. I would be happy to discuss that disagreement in the question and answer period.

Although we in ERIC oppose enactment of H.R. 3200, we are very willing to work with the committee and the subcommittees to ensure that discrimination against older employees is prohibited, and that employers are able to provide coordinated benefit packages that meet the needs of all their employees young and old.

I believe that all of us here today agree that arbitrary, unjustified discrimination against older workers should be prohibited. If the subterfuge language of Section 4(f)(2) of ADEA and other provisions of the act do not currently preclude such discrimination, H.R. 3200 is not the appropriate corrective measure.

We believe H.R. 3200, as currently drafted, codifies invalidated guidelines that are illogical, impractical and harmful to many employees. Based on the EEOC's testimony this morning, by their vice chairman and general counsel, it is also our understanding that these guidelines do not even fully reflect the current views of the EEOC.

We respectfully suggest that if Congress concludes that legislation in this area is necessary, the legislation should take into account two critical factors. First, that employers' resources to provide employee benefits are limited; and second, that the modern work force is highly diverse: that the employee body includes employees with a wide variety of ages, family responsibilities, income levels and other conditions and circumstances. Thus, the needs of all the employees in the work force are not identical. H.R. 3200 somehow would impose a standard that requires all benefits to be treated exactly equally regardless of the needs of employees, and would require employers to effectively ignore those needs.

Typically, an employer's objective is to allocate its limited resources to meet the needs of employees efficiently and equitably. In many cases, these decisions are made jointly by management and labor in collective bargaining, which has been acknowledged by the committee members and a number of others here this morning. We urge the Congress not to enact legislation that prevents an employer from providing benefits that best suit the needs of all its employees.

Modifying the bill solely to take cognizance of early retirement plans, as was suggested by representatives of the EEOC, will not remedy various problems with the bill. For example, many employers maintain both a pension plan and a severance plan to provide financial assistance to employees who are laid off. In many instances, as we have heard, employers either limit eligibility for severance pay to employees who are not pension-eligible, or integrate the value of the two benefits in providing the severance pay. In both cases, the employer's objective is to assure that severance pay is directed to those who need it most: employees who cannot receive an immediate pension and who therefore, are most likely to have the heaviest financial needs upon a layoff.

It is interesting that Mr. Mackaronis gave an example similar to the one that I also set out in my written testimony, and that is between two individuals, one 45 years old and one 65 years old, both who had 20 years service and are subject to a layoff. In his example over there that he just did, I submit that Mr. Mackaronis ignored the critical factor in comparing the value of the two benefits. That is, that the present value was ignored. As a matter of fact, in the example of the two employees, one was hired at 25 and one was hired at 45 since they had both had 20 years service. It would cost an employer approximately five times as much to provide the immediate pension to the 65-year-old as it does to provide the deferred pension, 20 years deferred, to the 45-year-old when laid off.

If the cost analysis is an appropriate one, even Mr. Mackaronis has turned that on its head by ignoring the cost of the pension benefit in trying to disallow it in integrating it with the severance benefit.

The EEOC guidelines themselves require an employer to ignore the value of the pension benefit in determining the amount of an employee's severance benefit. This was underscored this morning by the vice chairman and the general counsel of the agency. Such a rule needlessly spreads the limited financial resources available for severance pay to a greater group regardless of need, and thus, substantially reduces the amount available to those most in need.

To take another example, many employers offer early retirement window plans, as we have heard this morning; that is, offering enhanced pension benefits during a temporary election period. It certainly seems reasonable and equitable to either integrate the value of such enhancements with severance pay, or to require eligible employees to elect between receiving the pension benefit—the early retirement pension enhancement—and the severance pay.

As mentioned previously, many benefit plans are collectively bargained. Congress should not enact legislation that prevents a union from agreeing, on behalf of its employees whom it represents, to allocate pension benefits to older employees and severance benefits to younger employees. This is really what is at the heart of the collective bargaining process.

Finally, Congress should not enact a rule that would require the provision of duplicative benefits to older or younger workers, for that matter, a result that is likely to occur if this legislation is passed. For example, it is likely to require an employer to provide long term disability benefits, retirement income and pension accruals to older workers all at the same time.

If legislation is deemed appropriate, we urge that any such legislation meet three conditions.

First, that it be prospective in its application; second, that it permit all of an employer's benefit plans to be evaluated on a benefit package approach; and finally, that it permit an employer to use reasonable business reasons other than cost to justify age-based distinctions in its employee benefit plans.

I appreciate the opportunity for being able to present my views this morning. I would be pleased to answer any questions or respond to any statements after the others have had an opportunity to respond.

[The prepared statement of Mr. Macey follows:]

ERIC

THE
ERISA
INDUSTRY
COMMITTEE

STATEMENT OF SCOTT J. MACEY
VICE PRESIDENT AND SECRETARY, THE ERISA INDUSTRY COMMITTEE AND
EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL
AT&T ACTUARIAL SCIENCES ASSOCIATES, INC.

ON BEHALF OF
THE ERISA INDUSTRY COMMITTEE (ERIC)

BEFORE THE
SELECT COMMITTEE ON AGING
AND THE
SUBCOMMITTEES ON EMPLOYMENT OPPORTUNITIES
AND LABOR-MANAGEMENT RELATIONS
OF THE EDUCATION AND LABOR COMMITTEE
UNITED STATES HOUSE OF REPRESENTATIVES

ON
H.R. 3200

SEPTEMBER 21, 1989

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Chairman Roybal, Chairman Martinez, Chairman Clay, and members of the Committee and Subcommittees, my name is Scott J. Macey. I appear today on behalf of The ERISA Industry Committee, commonly known as ERIC. I currently serve as ERIC's Vice President and Secretary. I am also Executive Vice President and General Counsel of AT&T Actuarial Sciences Associates, Inc. Accompanying me is John M. Vine of Covington & Burling, ERIC's legal counsel.

ERIC is an association of more than 125 of the nation's largest employers. ERIC's members provide a wide variety of employee benefits under a multitude of broad-based employee benefit plans. These plans provide such benefits as health and life insurance, disability income, sick pay, severance pay, and retirement income. Employer-sponsored plans have been remarkably successful in efficiently allocating limited employer resources to meet the important and diverse needs of a large and heterogeneous work-force. More than 25 million Americans are covered by ERIC's members' plans. Many of these plans are maintained pursuant to collective-bargaining agreements.

ERIC's views are representative of a wide cross-section of major plan sponsors in the private sector. My comments today focus on the effect that H.R. 3200 would have on the benefit plans of major plan sponsors.

H.R. 3200 (1) codifies an EEOC interpretive bulletin or guideline that was invalidated by the Supreme Court and that provided that age-based distinctions in employee benefit plans are permissible under the ADEA only if the distinctions are justified by cost differences, (2) puts the burden on the employer to prove that an employee benefit plan that makes age-based distinctions does not violate the ADEA, and (3) provides that the ADEA applies to employee benefit plans that were adopted prior to the enactment of the ADEA in 1967. The bill also would apply retroactively in certain respects.

Although we oppose enactment of H.R. 3200, we are very willing to work with the Committee and the Subcommittees to ensure that discrimination against older employees is prohibited and that employers are able to provide coordinated benefit packages that meet the needs of all their employees.

However, as currently drafted, we believe the bill codifies guidelines that are illogical, impractical, and harmful to most employees. It is our understanding that these guidelines do not even fully reflect the current views of the EEOC, the federal agency that is responsible for interpreting and enforcing the ADEA.

In 1988, before the decision in Betts, the EEOC announced that it was considering making revisions to the guidelines. 53 Fed. Reg. 26,788-790 (July 15, 1988). Certainly, revisions in the guidelines and the positions taken therein are essential. Even before Betts, the guidelines were obsolete in important respects, since the statute had been amended a number of times after the issuance of the guidelines. Codification of the invalidated EEOC guidelines would stultify the proper development and application of the law and would impose unnecessary and harmful restrictions on employers, effectively preventing employers from targeting benefits to the employees who need them most.

We respectfully suggest that if Congress concludes that legislation in this area is necessary, the legislation should take into account two basic facts. First, an employer does not have unlimited resources to spend on employee benefits. Competitive conditions and the employer's own financial circumstances limit the amount that the employer can spend. Second, because the modern work-force is highly diverse, and includes employees with a wide variety of ages, family responsibilities, and income levels, the needs of all of the employees in the work-force are not identical. Typically, the employer's objective is to allocate its limited resources to meet the needs of its employees efficiently and equitably. In many cases, these decisions are made jointly by management and labor in collective bargaining. We urge the Congress not to enact legislation that prevents an employer from providing the benefits that best suit the needs of all of its employees.

In designing their benefit plans, employers attempt to provide benefits to the employees who need the benefits. For example, many employers maintain both a pension plan to provide their employees with retirement income and a severance plan to provide financial assistance to employees who are laid off. In many instances, employers either limit eligibility for severance pay to employees who are not eligible for an immediate pension or reduce the amount of the severance benefit by the value of the pension benefit. In both cases, the employer's objective is to assure that severance pay is directed to those who need it most: employees who cannot receive an immediate pension and who therefore are likely to have greater financial need as a result of a layoff. Employees who are entitled to receive an immediate pension may have less need for full severance benefits.

Defined benefit pension plans necessarily favor employees who are entitled to receive immediate pensions over those who are not entitled to receive immediate pensions. Severance pay can rectify this disparity. For example, it seems eminently fair, logical, and equitable to pay severance benefits to an employee who is laid off at age 45 with 20 years of service and to pay less or perhaps even no severance benefits to another 20-year employee who is laid off at age 65, with the right to receive a full pension beginning immediately. After 20 years of service, each employee might have earned a pension of $1,000 a month. However, the 65-year-old would be entitled to receive a pension immediately, while the 45-year-old would typically have to wait 20 years. The severance pay is designed to fill this gap temporarily for the worker who is not entitled to receive an immediate pension.

Nevertheless, the invalidated EEOC guidelines require an employer to ignore the value of the pension benefit in determining the amount of an employee's severance benefit. Such a rule needlessly spreads the limited resources available for severance pay to a greater group, regardless of need, and thus reduces the amount available to those most in need. For example, a 40 to 50-year-old employee with substantial family responsibilities and who is not entitled to an immediate pension could receive a reduced severance benefit to compensate for the fact that severance also would have to be paid to other employees who are eligible to receive an immediate pension.

To employers, this result makes no sense. It should be permissible to take the value of an employee's pension benefit into account in determining the amount of his severance benefit; in other words, to coordinate the benefits. If an employer is not permitted to coordinate its benefit plans, and is required to provide both severance pay and immediate pension benefits to the same employees, the employer may be forced to compensate for its additional cost by reducing the level of the severance or pension benefits that it provides to all of its employees.

Moreover, many benefit plans are collectively bargained. Congress should not enact legislation that prevents a union from agreeing, on behalf of the employees whom it represents, to allocate pension benefits to older employees and severance benefits to younger employees. Such trade-offs are at the heart of the collective-bargaining process.

To take another example, many employers offer early retirement "window" benefits from time to time. In providing a "window" benefit, a pension plan typically provides that a member of a specified class of employees is eligible for enhanced retirement benefits if the employee retires during a designated "window" period. Early retirement "window" plans have the salutary purpose of allowing an employee to choose to retire early and to receive an immediate pension that helps to offset the loss of wages that comes with early retirement. Early retirement "window" programs (1) give employees greater freedom than they otherwise would have, (2) preserve jobs, and increase promotion opportunities, for those who do not take early retirement, and (3) permit employers to reduce labor costs without relying on involuntary termination programs.

The employer also might provide that an employee who does not meet the "window" program's age and service requirements could elect to terminate employment and to receive severance benefits in lieu of the early retirement "window" benefits. The severance benefits might be particularly attractive to employees who are not eligible to receive immediate retirement benefits. Although this arrangement is sensible, logical, and equitable, H.R. 3200 would forbid it -- even if the value of the enhanced early retirement benefits exceeds the value of the severance benefits.

Some early retirement "window" plans also provide a smaller benefit enhancement to older employees who have reached, or who are approaching, the plan's normal retirement age. The reason for the small enhancement is that employees who are approaching normal retirement age do not need the same incentive to retire early as do younger employees. In addition, since the employer's objective is to reduce the size of its work-force, the employer will receive a greater benefit when a younger employee, with a potentially longer future career, retires.

Although the cost-justification rule in the EEOC's invalidated guidelines appears to prohibit an age-based "window" plan of this kind, the EEOC has stated that the ADEA permits an early retirement "window" plan to provide unequal benefits to older workers if (1) participation in the plan is voluntary for all retirement-eligible employees, and (2) there is a legitimate business reason for imposing age limitations. _See_ Memorandum of Law for the Equal Employment Opportunity Commission as Amicus Curiae, filed in _Cipriano_ v. _Board of Education_, No. 84-CV-80C (W.D.N.Y.) at 28-33.

The EEOC has thus recognized that the cost-justification rule in its guidelines does not deal adequately with all employee benefits and that the cost-justification rule is _not_ the exclusive method of determining whether age-based distinctions under a benefit plan are permissible. Indeed, during oral argument in the Betts case, the Solicitor General specifically conceded this point. See Official Transcript at 43-44.

By codifying the cost-justification rule, H.R. 3200 would make the statute significantly more restrictive than it was before the Supreme Court's decision in Betts. H.R. 3200 would, in effect, perpetuate an erroneous application of the law and sound policy by elevating what was once (prior to 1979) a regulatory safe harbor into the exclusive statutory rule.

If Congress codifies the EEOC's guidelines, employers will be prevented from providing a rational and coordinated package of benefits to their employees. For example, major employers typically maintain both long-term disability plans and pension plans. When H.R. 3200 is added to the requirements imposed by ERISA and the Internal Revenue Code, many of these employers will be required simultaneously to provide long-term disability benefits, retirement benefits, and pension accruals to disabled employees who are over age 70. Congress should not enact legislation that requires such duplicative benefits.

If legislation is deemed appropriate, we urge that any such legislation be prospective in its application, that it permit all of an employer's benefit plans to be evaluated on a benefit package basis, and that it permit an employer to use business reasons other than cost to justify age-based distinctions in its employee benefit plans.

Thank you for giving us an opportunity to present our views. We will be happy to respond to any questions that the Chairmen or other members of the Committee and Subcommittees might have.

Mr. MARTINEZ. Thank you, Mr. Macey. We are going to ask questions when all of the witnesses have given their testimony. But at this particular time we are going to have to take a recess for about 10 minutes to go to the floor and vote, and then we will be right back and proceed with the next witness, which will be Ms. Ellen Fredel.

[Whereupon, a recess was taken.]

Mr. MARTINEZ. The hearing is now reconvened. We will continue with the testimony of Ms. Ellen Fredel.

STATEMENT OF ELLEN FREDEL, ATTORNEY AT LAW, SHAW, PITTMAN, POTTS & TROWBRIDGE, WASHINGTON, DC

Ms. FREDEL. Good morning. My name is Ellen Fredel. I have submitted a written statement for the record. I am a partner in the law firm of Shaw, Pittman, Potts & Trowbridge here in Washington, D.C. I am here to present my personal views and not those of the firms or its clients.

I have practiced employee benefits law for over 10 years. During that time, I have counseled many employers regarding the impact of age discrimination laws on their employee benefit programs. These employers have ranged in size from Fortune 500 companies to small start-up companies.

As a practicing employee benefits lawyer, I would urge your committees and Congress to adopt the Older Workers' Benefit Protection Act and restore the equal benefit or equal cost rule. You should do so because the equal benefit or equal cost rule is fair, flexible and simple.

The equal benefit or equal cost rule is fair to employees because it encourages employers to provide equal benefits for older workers. However, it is also fair to employers. It does not require employers to provide any specific benefits. It does not tell employers that they must provide health, dental, life, disability, severance benefits or early retirement incentives.

It does say that if you provide those benefits, you should provide equal—you should either provide equal benefits or pay the same amount of dollars towards benefits for older workers as you do for younger workers.

In my experience, most employers now choose to provide equal health, disability and life insurance or other death benefits for similarly situated employees until the employees are 65 years of age. In my view, this reflects the employer community's acceptance of the equal benefit or equal cost rule as a fair rule.

I understand that the UNUM Insurance Company has submitted a letter to your committees that supports the rule, indicating that insurers also have not experienced difficulty in complying with the rule. If the act is not adopted, some employers may respond to the Supreme Court's decision in Betts by reducing or eliminating the benefits provided to older workers. The equal benefit or equal cost rule requires employers to show that differences in benefits that are age-related are based on actual differences in costs and not on perceptions or stereotypes.

My experience is that most employers do want to be fair, and do not want to discriminate against older workers. However, if Congress does not adopt legislation soon, some employers will use the loophole created by the Supreme Court's decision in Betts instead of being fair, and they will save some money doing it. The equal benefit or equal cost rule is flexible, because it acknowledges that some employers may not have the resources to provide the same benefits to all of their employees. In some cases, the equal cost portion of the rule may prevent the cost of benefits for older workers from becoming a disincentive to hiring older workers.

I think the proof of this flexibility is inherent in the fact that most employers have found it easy to comply with the equal benefit or equal cost rule during the 20 years it has been in force and the 10 years I have been in practice.

The equal benefit or equal cost rule is simple. This is not Section 89. How many rules that a benefits lawyer deals with can be summed up in five words: equal benefits or equal cost? This rule is easy to explain to clients: Provide the same benefits to your older workers as you do your younger workers unless age-based reductions in benefits are justified by higher costs. The clients who have wanted to use age-based reductions, for example, in reducing the amount of life insurance coverage or the period of coverage of disability benefits provided to employees over age 65, have not had difficulty in justifying those differences on the basis of cost.

In my experience, the equal benefit or equal cost rule does not interfere with the implementation of severance pay plans or early retirement incentive plans by employers. Several clients I advised have adopted early retirement incentive plans or exit plans, and have done so without drawing any age discrimination claims.

How did we do this? First, the employers gave employees sufficient time to make a decision regarding whether to accept the early retirement package, usually 60 to 90 days, and plenty of information on which to base a decision, including information about the relative values of the packages. Second, early retirement incentives were offered to all workers over a certain age, usually age 55, in the parts of the company that needed to reduce their work force. Finally, employers tried to accentuate the positive in their communication of their program to their workers: benefits of taking early retirement and not the threat of termination.

One of the most successful of these exit incentive plans involved an employer who offered exit incentives to all employees, regardless of age. This voluntary severance pay plan recognized that employees may want to leave their existing jobs for many reasons: to pursue an education, to obtain more challenging work, or simply for a change in scenery. Larger amounts were paid to longer-service workers in recognition of their contributions to the company and the difficulty that longer-service workers might have in finding a new job. The program was very successful. It was a good cure for job inertia, and both older and younger workers appreciated the package offered by the employer. Retaining the equal benefit or equal cost rule will help to encourage employers to be fair to older workers. It is a flexible and simple rule, and it works. It has worked for 20 years.

I urge you to adopt the Older Workers Benefit Protection Act.

[The prepared statement of Ms. Fredel follows:]

STATEMENT OF ELLEN A. FREDEL

Good morning. My name is Ellen A. Fredel. I am a partner in the law firm of Shaw, Pittman, Potts & Trowbridge in Washington, D.C. I am here to represent my personal views and not those of the firm or its clients. I have practiced employee benefits law for over 10 years. During that time, I have counselled many employers regarding the impact of age discrimination laws on their employee benefit programs.

Your committees and Congress should adopt the Older Workers' Benefit Protection Act and restore the "equal benefit or equal cost" rule. You should do so because the "equal benefit or equal cost" rule is fair, flexible, and simple.

The "equal benefit or equal cost" rule is _fair_ to employees because it encourages employers to provide equal benefits for older workers. However, it is also fair to employers because it does not require employers either to provide any specific benefits, or to provide equal benefits for older workers if that decision is in fact justified by age-related cost differences. Most employers now provide equal health, disability, and life insurance or other death benefits for similarly-situated employees until the employees are 65 years of age. While employers must continue to provide the same health coverage for active employees who are age 65 and over as they do for younger workers, most employers do reduce the disability and life insurance benefits provided to workers over age 65 because these benefits cost more for older workers.

The "equal benefit or equal cost" rule requires employers to show that differences in benefits are based on actual differences in costs and not on perceptions or stereotypes. My experience is that most employers want to be fair and do not want to discriminate against older workers. However, if Congress does not adopt legislation, some employers will use the loophole created by the Supreme Court's decision in Betts instead of being fair and they will save some money doing it.

The "equal benefit or equal cost" rule is flexible because it acknowledges that some employers may not have the resources to provide the same benefits to all of their employees. In some cases, the equal cost portion of the rule may prevent the cost of benefits for older workers from becoming a disincentive to hiring older workers. The proof of this flexibility is inherent in the fact that most employers found it easy to comply with the equal benefit or equal cost rule during the 20 years it has been in force (and the 10 years I have been in practice).

The "equal benefit or equal cost" rule is simple. How many rules that a benefits lawyer deals with can be summed up in five words? This rule is easy to explain to clients: provide the same benefits to older workers as to younger workers unless age-based reductions in benefits are justified by higher costs.

The clients who have wanted to use age-based reductions in life or disability benefits have not had difficulty in justifying those differences based on experience with the death and disability claims of older workers.

Critics of the Older Workers' Benefit Protection Act have identified two areas where they think employers need more flexibility: severance pay and early retirement incentives. Some critics are candid and say that employers want to discriminate on the basis of age in providing severance pay and early retirement incentives.

For example, some employers want the ability to deny severance pay to workers who are eligible to draw retirement benefits under a pension plan. Since virtually all pension plans require employees to meet an age requirement as a condition of drawing their benefits, age becomes a key factor in deciding whether the employee receives severance pay when he or she loses a job. These arrangements are based on the stereotype that all older workers want to retire and would not want to be in the labor market if they could draw their pension. This is not fair. The rationale for severance pay is to cushion the blow of unemployment, a blow that older workers feel more heavily. Older workers who want to continue working may need more severance pay, a fact that most severance pay plans recognize by providing higher benefits for employees with more years of service with the employer.

These arrangements are particularly offensive to me when eligibility for a pension earned over a long career as deferred compensation is used to justify providing no severance benefits under a special severance package adopted as part of a plant closing or layoff. Clients I have counselled have not adopted this approach to severance pay.

Several clients I advised have adopted early retirement incentive plans or exit incentive plans and have done so without drawing any age discrimination claims. How did we do this? First, the employers gave employees time to decide, usually 60 to 90 days, and plenty of information. Second, early retirement incentives were offered to all workers in specified divisions who were over a certain age, usually age 55. I do not think that employers need "age bracketed" early retirement plans to achieve downsizing. Finally, employers tried to accentuate the positive -- the benefits of retirement and not the threat of termination.

One of the most successful exit incentive plans I have worked on involved an employer who offered exit incentives to all employees. This voluntary severance pay plan recognized that employees may want to leave their existing jobs for many reasons: to pursue an education, to obtain more challenging work, or simply for a change in scenery. Larger amounts were paid to longer-service workers. The program was very successful. It was a good cure for job inertia and both older and younger workers appreciated it.

Retaining the "equal benefit or equal cost" rule will help to encourage employers to be fair to older workers. It is a flexible and simple rule and it works. Please adopt the Olders Workers' Benefit Protection Act.

Mr. MARTINEZ. Thank you, Ms. Fredel. Our next witness is Mr. Fred Rumak.

STATEMENT OF FRED RUMAK, DIRECTOR OF TAX AND LEGAL SERVICES, BUCK CONSULTANTS, INC.

Mr. RUMAK. Good morning, Mr. Chairman and members of the committee. I am Fred Rumak, Director of Tax and Legal Services at Buck Consultants, one of the oldest and largest employee benefit consulting firms in the country. My appearance today is on behalf of the Association of Private Pension and Welfare Plans.

The APPWP appreciates this opportunity to testify concerning H.R. 3200 because the organization is concerned that this bill, if enacted in its present form, could deal a devastating blow to a great many currently accepted and benefit arrangements and design practices such as early retirement subsidies and Social Security Supplements under defined benefit plans, as well as early retirement window plans and severance plans.

The bill would also prohibit benefit coordination and integration. As I will discuss, the changes could adversely affect employees and employers. In addition, the bill's retroactive effective date compounds the potential damage as it would impose entirely new law and cost on existing long-standing benefit arrangements in the pension area.

In sum, this bill, as I will discuss, though intended merely to prevent discrimination based on age, would prevent the use of numerous legitimate plan design and coordination features and unfortunately result in a lessening of retirement and benefit security of all employees.

In my experience and the experience of other benefit consultants, it is clear that employers could not afford the additional cost that this bill would impose, particularly in the pension area. And most employers would opt to reduce or eliminate benefits, hurting both young and old employees alike.

In my testimony, I will only highlight the major areas of concern and focus primarily on the defined benefit pension programs where age-related criteria is a crucial element of plan design.

Before getting into my remarks, however, I want to say that the APPWP from the very start has always been willing and continues to be ready and willing to work with the committee to resolve problems and difficulties with this bill so that the rules as fashioned can be equitable for all.

As concerns for my remarks, first, in considering the affects of this bill on employer-sponsored retirement plans, one must first recognize that defined benefit plans are designed and do favor older employees insofar as it generally costs an employer far more to provide defined benefit pensions for these employees than to younger employees. Offering this type of plan is generally in part to reward longer service employees, and it does so very adequately. It is also generally true that employers do provide and pay more for medical benefits for older employees than they do for younger employees.

Also, in determining what benefits an employer may offer employees, the employer always looks, in our experience, to the total cost of the benefit package. Rational programs take into account all benefits to which employees are entitled during their career and after retirement even though EEOC regulations do not take this approach thereby, providing the maximum level of benefits to the widest range of employees at the least cost.

If new legislation upsets the balance between benefit coverage and limited resources of employers, older workers may in fact suffer as dollars provided to increase certain benefits are taken from programs providing other benefits to them and others.

For example, many employers use a substantial portion of their benefit dollars to provide defined benefit retirement plans. Most of these plans often include early retirement provisions that typically are made available to employees age 55 and older. These provisions often include very valuable early retirement supplements or subsidies as a permanent or temporary part of the plan; usually increasing the value of the benefit provided to these younger employees as compared to older employees, which would be a problem under this bill. These benefits make it easier for long-service employees to retire voluntarily before their normal retirement age, and these programs may be discouraged on account of this bill.

A brief description about how early retirement supplements work could be helpful. Under an early retirement supplement program an employer provides a benefit to employees which is payable from their early retirement date until Social Security age or the normal retirement age under the plan. For an example, an employer might coordinate its plan with Social Security to provide a fixed total monthly benefit for employee electing early retirement. Such a program would work in the following way.

Assume a retiree would be eligible to receive $600 per month Social Security benefit at age 62, and $400 per month under the normal retirement formula under the plan. Under a Social Security Supplement, the plan could provide a $600 per month Social Security Supplement from the early retirement age to age 62, and this benefit would drop out when the retiree becomes eligible to collect Social Security Retirement Benefits. Therefore, the plan would pay the early retiree $1,000 per month from age 55 to 62, and $400 per month thereafter. Thereby assuring that the employee's overall benefits remained unchanged. The additional benefit of $600 per month to the employee from 55 to 62 apparently could not meet the cost justification standards of H.R. 3200.

In the case of a subsidized early retirement program, to understand how that works, we first must understand how benefits would be determined for an early retiree, 55 usually or older, under a plan without such a subsidy. If no subsidy is provided, the benefit of an employee who elects to retire at age 55 rather than at age 65, the plan's normal retirement date, that benefit will be actuarially reduced to reflect the fact that the employee will be receiving payments earlier and over a longer period than an employee who retired at age 65.

For example, assume, under a hypothetical pension plan without an early retirement subsidy, an employee who retired at 65 with 30 years of service would be entitled to a benefit of $800 per month. Under such a plan, an employee with the same years of service and salary history who retired at age 55 would expect to receive a benefit of $288 per month, which is 64 percent less.

The early retiree would be limited to this $288 benefit a month for life, including for years after attaining 65. However, if the employee who retires at age 55 and defers receipt of his payment until age 62, he or she will still receive a benefit of $800 a month. The reduction is on account of the payments commencing earlier, and the employee has the option to defer until his 65th birthday. Under a subsidized early retirement program, the employer often provides a subsidy so that there is no actuarial reduction in benefits for long-service employees who retire early. Thus, an employee retiring at age 55 could receive, in my example, $800 a month starting at age 55.

Early retirement subsidies could not meet the cost standard of H.R. 3200, because the actual amount of payment made or a cost incurred on behalf of an older worker would generally be less than the amount paid or incurred on behalf of a younger work. The present value of the cost of providing a subsidized benefit to an early retiree is clearly greater than the cost of providing normal retirement benefits to an older worker.

Also, even though the monthly benefits that the early retiree would receive would be the same or less than the monthly benefit the older worker would receive, the expected total payments made over a lifetime to the early retiree would always, or often be greater than the total payments made to an older employee retiring at age 65.

Under the bill's cost standard, employers wishing to increase benefits at early retirement, for example, by providing unreduced benefit at age 55 for those meeting years of service requirements, would have to proportionally increase the retirement benefits for both normal retiree and employees working past their normal retirement date.

Also, in this case, under ERISA rules, ironically, all vested accrued benefits of other employees would also have to be increased. In many plans the increased benefit costs could increase by 48 percent or more. These increases would certainly lead to benefit reductions if existing plans were forced to make these changes.

In addition to the early retirement provisions, many employers have offered special early retirement incentive programs to some of their employees for a limited period of time when faced with economic downturns which necessitate a reduction in their work force. These programs are viewed by employees and employers as favorable alternative to forced layoff.

They provide a humane way to deal with labor force reductions. These window plans sweeten, or make better a company's normal retirement benefit either by eliminating or reducing the normal reductions of pension plan based—in a pension benefit faced by retirees at earlier ages, or by providing benefits which supplement existing retirement benefits to increase the incentive to retire early. Window plans have been used widely by companies and are well accepted among employers as has been documented by countless studies. The bill could effectively create problems with this kind of program.

In designing an effective early retirement window benefit, the employer must and does balance two competing considerations. Generally, the retirements of a younger worker will result in greater payroll savings, but the cost of the pension of providing monthly benefit increases for life to younger retirement-eligible employees is significantly greater than the cost of providing the same benefit to those closer to normal retirement age.

In order to maximize the effectiveness of early retirement window plans, employers often target more money for benefits for younger retirement-eligible employees or limit the program to an age band of 5 to 15 years. If actuarially equivalent total benefits had to be provided to all retirement-eligible employees using resources which are equivalent to those used in the past, as the EEOC rules seem to require, the amount offered to younger retirement-eligible employees would be so low that it would be unlikely to give it an incentive for younger employees to retire.

An illustration of this could be important. Under one early retirement window program with which I am familiar, the benefits of an employee age 50 with 30 years of service and with an average final salary of $32,000, who was not eligible to retire under the plan's early retirement provision, chose to retire at age 55, and received immediately a benefit payable of $1,100 a month for life at age 50. This is an increase from an otherwise $650 per month benefit which would have become payable at age 55, 5 years later.

To provide actuarially equivalent benefits for all retirement-eligible employees using the same funds under the window program, the employer could only offer an immediate benefit payable of $800 per month to such an employee, or deferred pension first payable at age 55 of $650 under the plan's normal provisions.

It is unlikely that a sufficient number of younger employees would opt to retire with this type of reduced incentive. If the dollars available to induce early retirement are spread too thin, the incentives will be lost. Therefore, few employers will find the window plan attractive to involuntary layoffs.

Since it is very clear, and employers do not have unlimited funds to provide employee benefits, they frequently coordinate and integrate their benefits with other programs, considering all the benefits that an employee might be entitled to in a particular situation.

For example, in order to allocate employer-provided benefits to minimize duplication of employee entitlements, an employer may offset workers' compensation benefits that an employee receives against a pension benefit to which the employee is entitled.

Many plans also provide that employees may receive credited service for periods of disability prior to their normal retirement age. Such crediting of service assures that an employee is not prevented from accruing the benefit that the employee would have been able to earn if the employee had not been disabled before 65.

The additional service accredited to an individual disabled at a younger age will always exceed the amount credited to an individual who is disabled when older, and therefore could present problems under this bill. Approximately 40 percent of the 259 CEB members, which consists of large employers in this country, provides such credited service for disabled employees.

Some employers also coordinate benefits under pension plans with severance plans either by offering severance pay only to nonpension-eligible workers, or offsetting the value of the pension benefit against the severance pay.

Severance benefits are normally skewed to employees with long service and, when coordinated with pension benefits, tend to assist older employees who are but not quite old enough to retire under the eligibility program of the plan. This is often a relatively small group of employees compared with the population of retirement-eligible employees with similar service.

Through this coordination of severance and pension benefits, employers are able to target limited funds available for severance benefits to laid off long-service employees who are unable to tap their pension resources in order to provide for their needs during unanticipated employment.

If the employer were prevented from coordinating these plans, the severance benefits that could be offered for the same cost would have to be drastically reduced. For example, one company that we have worked with had to close a manufacturing unit. The unit had 1200 employees, of which 150 had 30 years of service. However, of the 150, only 100 of these employees were eligible for early retirement.

The 50 who were not eligible for early retirement were offered a severance package which averaged $45,000 to these 50 employees who were not retirement-eligible. The severance was not offered to the people eligible for retirement benefits.

However, if the same severance dollars had to be delivered amongst all of the 150 employees, each would only receive only $15,000. Providing $45,000 to all employees with more than 30 years of service, including those who are pension-eligible, would cost three times the cost of the initial plan covering only nonpension-eligible workers. Loss of coordination would force employers to eliminate or reduce severance benefits that already exist, and create significant disincentives for employers who are currently considering the adoption of such programs.

In our experience, companies that do not coordinate their benefits with severance benefits, with pension benefits, do not provide very valuable severance benefits to employees who are severed from employment.

As my example, I think, illustrates, the entire cost of benefit coordination is the way to most fairly allocate benefits, overall benefits among the largest number of employees. Coordination prevent permitting of benefits, providing duplicative coverage to some, and thereby reducing the amount of benefit available to all.

Coordination requires targeting of any additional employer-provided benefits to those with the fewest other available resources. Preventing such coordination, as I am advised the bill would do, will simply result in windfalls to some employees provided with duplicative coverages, and impose hardships on those employees who receive little or no benefits due to cutbacks needed to finance the broader provisions of the bill under each individual plan or benefit program.

Benefit integration has been an important tool to encourage employers to adopt pension plans and benefit plans, and enable them to allocate resources rationally among the greatest number of people. Coordination of workers' compensation benefits has been upheld by the Supreme Court, and a coordination of Social Security benefits is permitted by ERISA and regulations of the Internal Revenue Code for qualified plans. Accordingly, numerous plan sponsors have used various types of integration in plan design, never imagining that such integration might be prohibited in the future.

Insofar as actuarial calculations, which are the cornerstone of defined benefit plans, I have been advised that the EEOC has taken the position in litigation in the First District that any use of an age-based data would create a prima facie violation of ADEA and that the present value for the cost of benefits is not a sufficient showing of age-cost justification.

The only comment I would have here is that if age-based criteria is not permissive under this bill, then that could be the death knell of defined benefit plans in this country which provide the most valuable benefits to retirees, to older employees.

The last point I wanted to cover is the retroactive application of H.R. 3200. It is important, I think, to understand that the benefit structures that I have described in my testimony are far from new; most having been established in the 1940s and 1950s, well before the enactment of ADEA.

The structure has been retained since ADEA's enactment, and was in existence well before the Betts decision. To this day these elements remain an integral part of plan design.

As I discussed, the bill threatens numerous common features of plan design such as early retirement subsidies, Social Security Supplements, and coordination between pension and severance plans and workers' compensation and disability benefits. Requiring an elimination of these design features, even prospectively, could wreck havoc on employer benefit programs, including retirement plans, savings plan and welfare benefit plans, as employer seek to restructure benefits to meet the new standards without increasing cost.

Moreover, retroactive application of these standards seems unfair and would provide a huge underfunded liability on benefit programs that could only be disruptive and harmful to the American worker.

The bill could result in a significant curtailment of future benefits as employers attempt to restructure plans to comply with the new rules without violating Internal Revenue Code restrictions on anti-cutback of accrued benefits for qualified plans.

In summary, the bill could have some negative effects that run contrary to the purposes of the ADEA itself, and would disrupt long-standing employee benefit planning. We believe that older workers are valuable and vital components of our labor force, and we fully support ADEA's goal of encouraging and protecting such workers. However, we urge Congress to further consider the full ramifications of this measure prior to any undertaking of any action in this area.

We certainly appreciate the opportunity to appear before you today, and our members will be happy to continue working with you and your staff on this very complex and important area.

Thank you very much.

Mr. MARTINEZ. Thank you, Mr. Rumak.

Just so you do not get the idea that all insurance companies and all representatives of insurance companies are against H.R. 3200, I am going to honor the request of a particular corporation, UNUM, of including its written testimony in the record, and just read one part of it since they could not be here.

"The UNUM Corporation and its family of insurance companies, the Nation's leading provider of group long term disability insurance, generally supports the intent of H.R. 3200."

If there are no objections, the UNUM letter will appear at this point in the hearing record. Hearing no objections, so ordered.

[The prepared statement of Kevin McCarthy, Second Vice President, LTD Products/Markets, UNUM Corporation follows:]

Betts Case /

UNUM.

2211 Congress Street
Portland, Maine 04122
(207) 770-2211

September 20, 1989

The Honorable Edward Roybal
The Honorable Augustus Hawkins
The Honorable William Clay
The Honorable Matthew Martinez
The Honorable James Bilbray
U.S. House of Representatives
Washington, DC 20515

Dear Representatives Roybal, Hawkins, Clay, Martinez, and Bilbray,

In response to the decision of the Supreme Court in Public Employees Retirement System of Ohio v. Betts, you introduced H.R. 3200 to restore the original Congressional intent in passing and amending the Age Discrimination in Employment Act of 1967 (ADEA).

UNUM Corporation and its family of insurance companies (UNUM), the nation's leading provider of group long term disability insurance, generally support this intent and H.R. 3200.

Based in Portland, Maine, UNUM provides group long-term disability insurance to more employers than any other insurer in the United States. UNUM insures approximately three million workers under 28,245 group long term disability policies.

UNUM Life Insurance Company*
UNUM Life Insurance Company of America
First UNUM Life Insurance Company
UNUM Pension and Insurance Company
*Licensed in all states

UNUM has worked closely with the Department of Labor in establishing age-based reducing benefit duration schedules in long term disability plans that comply with the ADEA. In May, 1979, the DOL cited our reducing benefit duration schedule as an example of a cost-justified age reduction benefit schedule. The age-related cost justification methods involved in establishing our schedules and the industry's safe harbor (as allowed by the ADEA and the Department of Labor's 1979 Interpretive Bulletin) have proved to be valid, reasonable and workable.

We do, however, offer the following recommendation on H.R. 3200 to avoid increased litigation and incorrect interpretations of the ADEA:

> **INCORPORATE SPECIFICALLY SUBSECTIONS (d)(1), (d)(2), (d)(3), AND (f) OF SECTION 1625.10, TITLE 29, CODE OF FEDERAL REGULATIONS (CFR) INTO THE ADEA RATHER THAN INCORPORATING SECTION 1625.10 IN ITS ENTIRETY.**
>
> These are the subsections relevant to the intent of H.R. 3200 and address cost data and cost comparisons made on a benefit-by-benefit basis and a benefit package basis.

We understand that the intent of referencing Section 1625.10 of the CFR in H.R. 3200 is to incorporate into the ADEA those subsections applicable to and permitting individual benefit and benefit package cost comparisons. However, by referencing the entire 1625.10 section, a court, employer, or insurer could determine that the entire 1625.10 section is incorporated into the ADEA. This presents the following problem:

Section 1625.10 Defines The Term "Subterfuge".

Subsection (d) of Section 1625.10 of the CFR uses and defines the term "subterfuge". H.R. 3200 deletes the term "subterfuge" from §4(f)(2) of the ADEA. H.R. 3200 does this by adding a new subsection, §4(f)(2)(B), which states that a bona fide employee benefit plan is not unlawful if the "actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker." However, by referencing the entire 1625.10 section, H.R. 3200 incorporates into the ADEA not only the term it seeks to delete, but also a subterfuge definition that is different from the language in §4(f)(2)(B) stated above.

Therefore, by specifically incorporating subsections (d)(1), (d)(2), (d)(3), and (f) of Section 1625.10 of the CFR, H.R. 3200 accomplishes the following:

1. Avoids possible statutory interpretation problems created by incorporating the term "subterfuge" and its accompanying definition found in subsection (d) of Section 1625.10 of the CFR into the ADEA.

2. Clarifies that the "approximate equivalency" standard of cost comparison between younger and older employees used in subsection (d)(3) of Section 1625.10 of the CFR is the standard H.R. 3200 intends when it states in §4(f)(2)(B) of the ADEA that the "actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker." (Emphasis added.) In other words, the "no less than" cost comparison language in the ADEA means the "approximate equivalency" cost comparison standard established in subsection (d)(3) of Section 1625.10 of the CFR.

We thank you for the opportunity to present our recommendations.

Sincerely,

Kevin McCarthy

Kevin McCarthy
Second Vice President
LTD Products/Markets

Mr. **Martinez**. Mr. Fretz.

STATEMENT OF BURTON D. FRETZ, EXECUTIVE DIRECTOR, NATIONAL SENIOR CITIZENS LAW CENTER, WASHINGTON, DC

Mr. **Fretz**. Thank you, Mr. Chairman, for the opportunity to testify. I am appearing as Executive Director of the National Senior Citizens Law Center. The law center is a member of the Leadership Council of Aging Organizations, an organization of 39 separate groups having a nationwide membership.

By letter of this date to Chairman Roybal, the leadership counsel has expressed its positive and strong support for the legislation which is under consideration today. I have submitted my testimony for the record, and I would just like to touch on a few points.

It is fairly clear that the principle that is embodied in H.R. 3200 is accepted quite broadly by the public, and by the management community as well. We have lived with the law for more than 20 years prior to the Betts decision. I do not hear anyone seriously suggesting that employers should be free to discriminate in most benefit areas; in sick leave or annual leave, or even in health care plans, or life insurance plans where there is no significant cost justification. That, after all, was a settled matter of law prior to last June 23rd.

There are three points that recur by way of objections to H.R. 3200 which I would like to address. First the question arises whether H.R. 3200 for the first time would prohibit the use of any age distinction, and thus would invalidate an age distinction in a pension plan or an early retirement plan. As representatives from the commission and others have testified, the ADEA does not prohibit the use of age distinctions by and of themselves. The ADEA does prohibit the use of age distinctions in a way that discriminate against older workers.

Making a pension plan available to employees who are 65 is an age distinction, but it is not violative of the act. Making early retirement benefits to workers who are 57 years old or older is an age distinction, but again not violative of the act. That has been permissible for 20 years prior to Betts, permissible after Betts, and permissible under this bill. I do not think there can be any question about it. If there is, then I would urge this committee to resolve it either in the language of the bill or by way of legislative history to it. That is a point on which everyone's intent is the same, and it is simply a matter of clarifying the language.

Second, more serious questions concern the effect of this bill on coordination of severance pay packages with benefits such as early retirement. A certain appeal to the idea of such coordination appears at first blush. After all, it usually comes up at a time when a company is engaged in a layoff or a closing. There is only so much money to go around. Why not do it, we ask, in a manner that accounts for other benefits that might be available? The argument rests on avoiding what some call duplicate coverage.

It is very important, Mr. Chairman, that we look at those two plans, severance pay and early retirement. And when we dissect them, we see that they really are not duplications and that they serve very different purposes. Severance pay is normally borne by the employer. The purpose is to provide a lump-sum payment to workers in order to tide them over during a period of unemployment. That purpose is especially important for workers in their mid-fifties, who have a more difficult time than younger workers, on average, in securing reemployment. This means 63 percent longer periods of unemployment for persons in the age 55 and above category, according to the Department of Labor.

Pension benefits and early retirement benefits, of course, address a different need. That is the need for at least a minimal level of income to the worker and the worker's family throughout the remaining years of the worker's life. Imagine a worker, age 57 years, caught in a sudden plant closing. That worker is told that those under 57 will receive severance pay in order to tide them over until they get a new job, but that the 57-year-old worker is not entitled to severance pay, and instead must accept early retirement benefits. That can be pretty harsh on a worker who does not choose it, or on a worker who has plenty of family obligations, who may have children in college and other obligations and needs to continue working and doesn't opt for early retirement.

Two different purposes are served by these two programs. It is important to preserve at least the option in a worker to opt between the two. The workers must not be forced to accept early retirement and actuarial reductions in the amount of the pension benefits that often attend it, and be completely foreclosed from severance pay.

Third, a question arises about the so-called retroactivity provisions in H.R. 3200. We are not talking about complete retroactivity in the classic sense. We are talking about whether the effective date of the bill should be the date of enactment, or whether it should be June 23rd last, the date of the Betts ruling.

The policy in favor of the June 23rd date is simply to avoid unnecessary gaps in the law's coverage. The purpose of this bill, as I understand it, is simply to restore the law to its state on June 23rd, and in doing that it simply makes sense to treat all parties equally in similar situations. Parties will not be subject to entirely different treatment depending on the month in which a claim arises or happens to be adjudicated.

We must confine the inquiry to actual examples of prejudice to a company from making the effective date June 23rd rather than the date of enactment. There has been plenty of testimony today, but we have not heard testimony of specific prejudice that would arise because of the use of the June 23rd date.

Again, thank you, Mr. Chairman. I will be happy to answer any questions.

[The prepared statement of Mr. Fretz follows:]

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STATEMENT OF BURTON D. FRETZ

NATIONAL SENIOR CITIZENS LAW CENTER

on H.R. 3200

before the

SELECT COMMITTEE ON AGING,
COMMITTEE ON EDUCATION AND LABOR
SUBCOMMITTEES ON EMPLOYMENT OPPORTUNITIES
AND LABOR MANAGEMENT RELATIONS,

HOUSE OF REPRESENTATIVES

Washington, D.C. September 21, 1989

Los Angeles Office: 7th Floor, 1052 West 6th Street, Los Angeles, California 90017 • (213) 482-3550

STATEMENT OF BURTON D. FRETZ, EXECUTIVE DIRECTOR, NATIONAL SENIOR CITIZENS LAW CENTER

before the

SELECT COMMITTEE ON AGING, COMMITTEE ON EDUCATION AND LABOR
SUBCOMMITTEES ON EMPLOYMENT OPPORTUNITIES AND LABOR
MANAGEMENT RELATIONS, HOUSE OF REPRESENTATIVES,

SEPTEMBER 21, 1989

Thank you for the opportunity to testify on the effect of the recent Supreme Court decision in Public Employees Retirement System of Ohio v. Betts. That decision, as the dissent observes, effectively immunizes all employee benefit programs from liability under the Age Discrimination in Employment Act of 1967 (ADEA). H.R. 3200 would restore the law prior to the Betts ruling, and we urge its prompt adoption.

The National Senior Citizens Law Center is a national support center providing advocacy and support on legal problems of the elderly poor to legal services attorneys, private attorneys rendering pro bono services, and representatives of older clients under the Older Americans Act. Our staff responds to approximately 4,000 requests yearly for advice, technical assistance and co-counsel. These requests include the area of age discrimination in the work place. With this background we offer the following comments.

1. H.R. 3200 is necessary to restore the law to its settled interpretation of twenty years.

The drastic rewriting of the ADEA in Betts must be recognized. The Betts majority, does not limit its ruling to "employee benefit plans" under Section 4(f)(2). Instead, it exempts all employee benefits from the Act's coverage. It prohibits discrimination only in "hiring and firing, wages and salaries, and other non-fringe-benefit terms and conditions." Under Betts, an unscrupulous employer is now free to permit a younger worker three weeks vacation and a fifty-five year old worker one week; to give a younger worker full health benefits and an older worker only partial benefits; to allow a younger worker generous sick leave and an older worker none.

The Betts ruling opens the door to complete evisceration of the ADEA. This ruling contravenes a broad public consensus in this country which condemns age discrimination in the workplace. It also ignores a twenty-year interpretation of the Act shared by Congress, the agencies, and the courts.

Section 4(a) of the ADEA specifies coverage of "terms, conditions or privileges of employment"-- language which includes employee benefit plans. Section 4(f)(2) creates a narrow exemption for a plan "such as a retirement, pension or insurance plan" which is not a subterfuge to evade the purposes of the Act. Congress enumerated those types of plans which typically involve costs that increase as an employee ages. Moreover, the ADEA's purpose is to prohibit arbitrary discrimination against older workers; discrimination becomes arbitrary which has no foundation in legitimate cost differences between older and younger employees. The equal cost standard of Section 4(f)(2), therefore, is supported by the very language of the Act.

The legislative history to the ADEA leaves no doubt of Congress' intent that the benefit plan exemption requires a

the amendment that became Section 4(f)(2), at the time of its passage explained its purpose to allow employers to provide different benefits to older employees "because of the often extremely high cost of providing certain types of benefits to older workers." 113 Cong. Rec. 31,254-31,255 (1967). Senator Javits later re-emphasized that under the narrow exception, "[w]elfare benefit levels for older workers may be reduced only to the extent necessary to achieve approximate equivalency in contributions for older and younger workers." 124 Cong. Rec. 8218 (1978). At no point in the debates did any member endorse the wholesale reconstruction of Section 4(f)(2) announced in Betts.

From the time of the enactment of the ADEA until the Betts ruling, the two federal agencies administering the Act consistently interpreted Section 4(f)(2) to require a cost justification. The Department of Labor, which then administered the Act, provided an interpretation shortly after its passage: "A retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage." 34 Fed. Reg. 9709 (1969). That construction is maintained in the current regulations of the Equal Employment Opportunity Commission (EEOC). 29 C.F.R. 1625.10(a)(1).

Five federal courts of appeal have addressed this issue and all have endorsed the equal cost standard set forth in agency regulations, or else have required a similarly strict cost justification for an age discriminatory provision in an employee benefit plan.

2. H.R. 3200 will not change the law governing voluntary early retirement programs.

H.R. 3200 codifies the equal cost standard governing employee benefit plans as set forth in the current EEOC interpretation. In administering the Act prior to the Betts ruling, the EEOC did not take the position that the equal cost standard invalidated voluntary early retirement programs. The result would not change with this legislation.

The ADEA prohibits age discrimination, and not mere distinctions on the basis of age. The EEOC interpretation itself applies the equal cost standard to "a plan or plan provision which prescribes lower benefits for older employees on account of age." A truly voluntary early retirement program does not provide for lower benefits or otherwise discriminate against older workers, and thus is unaffected by this bill. Early retirement programs which are structured to discriminate against older workers, Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir.), cert. denied, 108 S.Ct. 2038 (1988), or which are not voluntary, Paolillo v. Dresser Industries, Inc., 821 F.2d 81 (2nd Cir. 1987), will remain subject to challenge as they were prior to the Betts ruling.

3. Reasonable offsets will remain permissible.

H.R. 3200 raises questions about its effect on several practices in which an employee benefit is offset by another available benefit. One involves the integration of disability benefits with retirement benefits. This practice can continue under H.R. 3200.

The cost of insuring against disability increases with age. Accordingly, an employer may decrease disability benefits to older workers by showing how the practice is cost-related. Disability benefits do not have to be continued throughout a worker's life: Eventually a worker's disability benefits will fall below the value of retirement benefits, and will be subsumed in a retirement plan.

This legislation would restrict the practice of offsetting severance pay with early retirement pay. This practice is not cost-justified. Severance pay and early retirement pensions are two different programs serving two different purposes. Severance pay cushions the harsh effects of sudden unemployment. An employer bears the expense of severance pay.

An early retirement pension provides a regular income throughout a person's retirement years. It is ordinarily paid through an existing pension plan, not directly by the employer. It reflects contributions earned over a lifetime of work, a part of which the employee often makes personally.

A 55 year old worker who suddenly becomes unemployed will need severance pay as subsistence income until becoming reemployed. Periods of unemployment for older workers are 63% longer, on average, than for younger workers. The older worker also will need pension benefits as an important source of income during retirement. Fairness requires that a worker not sacrifice the right to severance pay simply because that worker has earned a separate benefit serving a different purpose.

4. An effective date of June 23, 1989 for this legislation is fair and sound.

H.R. 3200 would become effective on June 23, 1989, the date of the Betts decision. This effective date will maintain continuity and uniformity in the law, and will avoid a sudden and irrational gap in the laws' coverage.

The enactment of retroactive statutes confined to short and limited periods required by the practicalities of producing federal legislation is a "customary congressional practice" and is especially appropriate where Congress wishes to prevent employers from taking unfair advantage of the legislative process in order to frustrate the purposes of a statutory change. Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 731 (1984).

H.R. 3200 was introduced on August 4, 1989, just six weeks after the Betts ruling. Its purpose is to restore the law prior to Betts. No employer can claim prejudice or surprise by this development. The only employer who would be significantly affected by this legislation is one who scrambled immediately after the Betts ruling to load its employee benefits with age discriminatory provisions. We believe that no employer would try to exploit the Betts ruling in such a fashion.

The effective date of this bill simply fills a short and unexpected gap in the law's continual application for more than twenty years. It assures that all persons and all plans affected by the law will be treated alike.

The equal cost standard is both fair and objective. It has worked very well for many years, and it should be restored.

Mr. **Martinez**. Let me start with you since we ended with you. You went last. You can go first now.

One thing that we have not covered, but it is one that is very important to me, because understanding that the older worker in many cases, by intimidation or anything else, is at a disadvantage in any negotiation with an all-powerful employer. But a major result of the Betts decision which I think is very wrong, is it shifted the burden of proof to the employee rather than the employer.

Therefore, what we are trying to do in this bill, too, is change that burden of proof back to what it was; to require the employer to prove why, unless it is cost-related, it is not discrimination. Would you respond to that?

Mr. **Fretz**. Yes. I think that placing the burden of proof on the employer is important whenever the employer chooses to use an age distinction that does discriminate against an order worker or workers, which is what is contemplated in the bill.

The employer can discriminate only by showing a cost justification, and it is the employer who has that information. The employee does not have it. The plaintiff does not have it. And for that purpose, it simply makes sense to require the employer to come forward and convince the tryer of fact on the point.

Mr. **Martinez**. Thank you. Mr. Rumak, in your testimony, and I will refer back to it to refresh everybody's memory. It says, "We respectfully suggest that if Congress concludes legislation in this area is necessary, the legislation should take into account two basic facts.

"First, an employer does not have unlimited resources." I think in your oral testimony you might have worded that a little different.

Mr. **Rumak**. Yes.

Mr. **Martinez**. I support your points that businesses do not have unlimited resources to spend on employee benefits. A lot of us in Congress are not insensitive to that. You know, I ran my own business for 28 years before I got into the political scene, and I can understand what costs are of operating a business and providing benefits for employees and all that. But I do know that you have got to watch your margin of profit versus all of that that you do provide to the employees. So we are not insensitive to that. We are not trying to tell you how much to spend on each employee or how much you have to provide.

We are saying if you do it, do not do it in a discriminatory way against the older worker. That is all we are saying. Do not do it in a discriminatory way against the older worker. In fact, before Betts, the law did provide that if you could prove that it was cost-related, the reason why there was a difference, that that would be allowed. So it is really not a question of that. I would like you to respond to that.

Mr. **Rumak**. Well, I think the point I was trying to make is that employers do look at a limited amount of dollars for benefit purposes. And assuming they are going to use the same dollars to start with, and they have to increase benefits under this bill for older workers, that would mean that the benefits may be adjusted downward for everybody.

I had an example there concerning certain features of defined benefit plans which favor younger-older employees as compared to older employees with subsidies and things of that nature. And the point I was trying to make is that unless the bill is fixed or clarified in certain ways, some of those things could be per se discriminatory, which would require an employer to increase the benefit for older employees which could then trigger a situation under ERISA where they would have to increase the value for all vested-accrued benefits because of the ERISA rules that say a person who is vesting under the plan should vest in the benefit that a normal retiree is going to get. So if you have to increase the normal retirement benefit, you are also compounding it.

Mr. MARTINEZ. I guess your testimony is based on the bill as you understand it now. And there were earlier statements made by several members, including the EEOC, that we do find that there is lacking in the bill now language that clarifies that we do not want to prejudice in any way any early retirement plans that gives an individual that wants to voluntarily retire, an opportunity to retire.

But let me ask you a question, and this is not something that you said, or I do not think anyone here said it. It is kind of an indication from the business community that claims that any legislative proposal to remedy the Betts decision will go against accepted industry practices, and that is exactly how it has been put by some people from the business community.

Let me ask you, is it accepted industry practice to discriminate between older workers and younger workers in employee benefit plans?

Mr. RUMAK. To discriminate in favor of older workers?

Mr. MARTINEZ. Without significant cost justification.

The question is: Has it been accepted industry practice to discriminate between older and younger workers in employee benefit plans without significant cost justification?

Mr. RUMAK. Well, I guess in my experience with large companies, older workers—companies provide more valuable benefits for older workers than they do for younger workers in the case of medical, life insurance coverages, pension coverages. So we do not see discrimination against older workers in our situation.

The way the bill reads is that you would be looking—comparing benefits provided to younger-older person, for example, I'll use that term, as compared to an older person. And because there could be differences, you may have to ratchet up the older person's benefit, which is even beyond the cost that a company otherwise is paying for that benefit because of actuarial factors.

Mr. MARTINEZ. Thank you.

Let me turn to Mr. Mackaronis. The issue of early retirement plans under 3200, would you respond to that.

Mr. MACKARONIS. Well, as I tried to make clear, Mr. Chairman, through my chart, there can be no dispute that a whole range, a very broad range, of which my chart is not all inclusive, of early retirement incentive benefits can be offered in a nondiscriminatory fashion, both before the decision in Betts, as well as under H.R. 3200.

I think the discussion around cost is something which I find extremely ironic, because as I mentioned earlier, it was precisely cost that caused the original 4(f)(2) exception to be implemented. Employers can take cost into account. What they cannot do is save money at the expense of older workers based on unlawful assumptions.

So, for instance, in the severance arena, you cannot deny an older worker severance based on the assumption that they do not need it. They have got a pension. You cannot deny an older worker, likewise, an early retirement incentive based on the assumption that they are going to retire anyway and I do not need to give them any money.

As far as I am concerned, Mr. Chairman, the bill as written embodies the law as it existed pre-Betts. There are a whole range of nondiscriminatory programs available to employers. It needs no amendment to facilitate other programs which up until now have been discriminatory because obviously such an amendment, at least in my view, would overturn existing law which protects older workers against those unlawful assumptions that I have been talking about.

Mr. MARTINEZ. Ms. Clauss, do you believe that Congress did not intent to protect older workers from age discrimination in employee benefit plans?

And if so, where do you find support for that point of view?

Ms. CLAUSS. I'm sorry, sir.

Mr. MARTINEZ. Earlier in your testimony you went through a history of the intents of Congress. And, of course, the Supreme Court has evidently, in some of our minds anyway, misinterpreted that intent. But I think that you have a firm belief that Congress did intend to protect older workers from age discrimination in employment benefit plans.

Ms. CLAUSS. Yes.

Mr. MARTINEZ. Could you allude to where you—

Ms. CLAUSS. Yes. Senator Javits repeatedly discussed the impact of the Age Discrimination Act on employee benefit plans. In fact, I am experiencing deja vu because the argument was made in 1967, and again in 1978, that if Congress did what it clearly intended to do, which was to protect older workers from discrimination in these plans, that it would wreck havoc. And Senator Javits was satisfied that the—after all, was the author of the ERISA bill—that the equal cost or equal benefit solution adequately protected employee benefit plans from the kind of havoc that industry suggests would occur.

And before the 1978 amendments were passed, Congress checked with those government agencies responsible for administering benefit plans: the IRS and the ERISA unit at the Department of Labor. And they found that Congress' intent to protect these plans created no potential disaster for the creation and formulation of those plans.

And I just hear the same argument being made that Congress has twice rejected, and I suggest Congress should reject it yet a third time.

Mr. MARTINEZ. Mr. Macey, would you care to respond to that?

Mr. **Macey**. Yes. Before I do, I would like to make a couple of statements, if it is permissible, with the Chairman.

Mr. **Martinez**. Yes.

Mr. **Macey**. Number one, I think that even the representatives of the EEOC today testified that they thought that some changes in the statutory language would be necessary—

Mr. **Roybal**. Would you bring the microphone up, please?

Mr. **Macey**. —in order to take cognizance of early retirement incentive programs.

Secondly, you asked Mr. Rumak several questions; one of which seemed to be based on testimony that I actually submitted, which was the two factors about costs and limited resources and the diversity of the employee body.

And based upon that, I think Mr. Mackaronis talked about improper assumptions, and that is true. I do not think that employers should make improper assumptions. I think the result of this legislation however, is that Congress would be making certain improper assumptions about what people need in different context, and what they do not need.

Finally, in response to Professor Clauss, Mr. Mackaronis, and Mr. Fretz, I would say that, if cost differentials are the reasonable and sound basis—and I am not saying that they are, but a lot of people are urging that as the only basis for making distinctions in benefits—then it seems to me that such should be a comprehensive test and it should include all benefits, rather than picking and choosing. We should not be saying, well, it can include 70 percent of the benefits, but it cannot include pensions, because that is what those invalidated guidelines did. They excluded pensions from the issue.

As far as the statements that Professor Clauss made just a moment ago, and in response to your inquiry, I would say I do not want to retry the case. Seven justices of the Supreme Court determined that 4(f)(2) and Congress did not intend to preclude age discrimination in employee benefit plans per se, based solely on cost differentials or other factors unless they were used for some other nefarious purpose that was impermissible under 4(a)(1) or some other provision of the act.

Whether that is the appropriate result on a comprehensive basis going forward, I do not know. What I do know and feel strongly about is that this particular piece of legislation, in my mind, and I say this in all due respect, needs a lot of work if it is going to be workable and achievable on what the ultimate purpose should be.

Mr. **Martinez**. Mr. Dichter, I saw you making notes. Do you care to respond to some of that?

Mr. **Dichter**. Yes. Thank you very much, Mr. Martinez.

First of all, I think there has been a very significant misunderstanding of the law here or misstatement of the law. The statement that equal cost or equal benefit has been the only exceptions under Section 4(f)(2) consistently interpreted simply is not true. The EEOC itself, in its brief in the Cipriano case, said there can be other legitimate business reasons other than age-cost under 4(f)(2).

Secondly, the Solicitor General of the United States representing the EEOC in the Betts case, in the oral argument, conceded that 4(f)(2) is not absolutely limited to cost-based justifications. In fact, in the Cipriano case itself the court found lawful a collective bargaining agreement provision which limited a benefit, an early retirement incentive to people under the age of 60. It approved a strict age cutoff without any age benefit cost requirement.

In fact, as early as 1974, the Fifth Circuit rejected the Department of Labor's position that age-cost benefits were the only possible exception under 4(f)(2). So the conception that this has consistently been the law simply is not accurate.

Secondly, I think when we talk about integration of benefits, most of the focus has been on severance pay. But one of the problems is there are other forms of benefits, like long-term disability benefits, which are frequently integrated with pension and other forms of benefits. If you took a strict benefit cost analysis, on a benefit-by-benefit approach, then that integration would be precluded by the same arguments that suggest that you can't integrate severance pay with pension benefits.

Another statement made earlier by the EEOC, which I was surprised to hear, is that the Age Act only prohibits discrimination against older workers and not in favor of older workers and that this has consistently been the law. This statement, I submit, is inconsistent with their own interpretations. If it was the law, and I am not arguing whether it should or should not be, then it would mean there is a significant distinction between the Age Act and Title VII, because we all know Title VII also does protect whites and males. It works both ways.

If the suggestion is the Age Act only prohibits discrimination against, but not in favor of, older workers, that may be an appropriate interpretation, but that is not what the EEOC has said in its own interpretations. Those interpretations generally state that you cannot discriminate either way within the protected age group, except under certain circumstances.

The reason I cite that is as an example of the fact that these same—Interpretive Bulletins—present a great deal of confusion. When we deal with the employee benefit area, what may seem as a simple solution on its face, is that older workers should be treated no less favorably than younger workers. No one will disagree with that concept. The question is what does that concept mean. What does it mean when you look at the range of benefits and how you apply the Age Act to those benefits?

Take another simple example. The EEOC Interpretive Bulletin suggest that for life insurance you can use 5-year groups. That is, since we know insurance companies charge more for life insurance for someone older, you can make adjustments in 5-year bands. So you can either charge more or reduce the benefits for someone between 60 and 65 compared to somebody between 55 and 60.

Now, what that may mean is if someone is unfortunate enough to die the day before their 59th birthday, they will get a larger life insurance benefit than someone that dies the day after their sixtieth birthday. That is an unfortunate result. It is age-based. Age is simply the only reason for it, that 1 day difference. But it is recognized that when we deal with age, we are going to have to make some arbitrary distinctions to recognize these increasing costs. It cannot be done on a pure mathematical formula.

And it is because of that complexity, that the simplicity of H.R. 3200 will reek the havoc that has been suggested today. Thank you.

Mr. **Martinez**. Mr. Fretz, it seems to me that a lot of this debate and confusion over what is going to be if we restore this and what it was before is something that has been ongoing for a long time. Do you think that that confusion would be cleared up by this bill, or would it still remain in the same status it always has?

Mr. **Fretz**. Mr. Chairman, I think this bill would go most of the way to eliminating confusion over two main points.

First, whether the act does or does not apply to age discrimination in furnishing employee benefits, this bill would make it clear that it does so apply as it clearly applied for 20 years prior to Betts. It would also eliminate confusion over the question of what an employer has to do to meet that employer's burden to justify the use of age discrimination in benefits. It would eliminate that confusion to the extent it was eliminated prior to Betts.

I believe that several witnesses have made it clear that in the 20-year regulatory history to the ADEA, the agencies charged with its enforcement have promulgated a regulation which identified the equal cost or equal benefit standard as a means by which an employer may escape liability for age discrimination in benefit plans. That regulation, or interpretation, has been consistently on the books, an interpretation of it by a staff attorney in a particular case notwithstanding.

For that reason, to answer the Chair's question, I think that the major areas which are now left in doubt by the Betts decision would be resolved and would be resolved clearly.

Certainly, whenever Congress passes a law, as long as there are lawyers around and clients whose interests clash, there will be some question about the further reaches of the law. But I think this bill is soundly constructed and minimizes even those questions.

Mr. **Martinez**. Thank you.

Ms. Fredel, do you believe, as some do, that the bill H.R. 3200 needs an amendment regarding the voluntary retirement? And why?

Ms. **Fredel**. I think the issue needs to be addressed in some way. I am not sure that H.R. 3200 is the right vehicle. There has been a whole course of adjudication of early retirement incentive plans under 4(f)(2). I think that those cases have resulted in pretty clear guidelines for employers to follow in structuring early retirement incentive plans.

I think the thing that the committee needs to consider is what the impact on early retirement incentive plans is of the provisions that Congress passed in 1986 that are part of 4(i), and I think that those provisions also relate extensively to this notion of whether H.R. 3200 will be the death knell of fine benefit pension plans. I think that Congress did a very good job in drafting 4(i) and the related provisions of ERISA and the Code that were affected by that legislation in trying to protect such things as Social Security Supplements, disability benefits, early retirement subsidies that are part of a pension plan.

What I think might be helpful is to make sure that Congress indicates that there is to be a coordination between the rules of Section 4(i) and the related provisions in ERISA and the code that specifically recognize some of these practices and this new provision. Make sure that you do not undo some of the good work that Congress has done there and which is now being implemented by regulations being issued by the Internal Revenue Service and the Equal Employment Opportunity Commission.

I would make a similar statement, I think, regarding Section 4(g) of the Age Discrimination Act, which is a special section that relates to providing health coverage to Medicare-eligible employees and their dependents.

Congress there passed some special rules in part to take care of problems that were arising with providing Medicare benefits, and to shift some of the burden of the cost of providing health benefits from the government to the employers of those older workers. And I do not think you should do things as part of H.R. 3200 that upset that policy result.

Mr. MARTINEZ. Ms. Clauss, would you care to respond to that same question?

Ms. CLAUSS. Yes. I wanted to make one comment in response to the charge that the agency interpretation has been inconsistent.

There are two issues here. The first is, did Congress intend employee benefit plans that have no cost component based on age to ever be denied older workers? And on that the agencies have been absolutely consistent saying from day one if the benefit plan didn't increase in cost with age, then the older worker had to be admitted into that plan without any qualification. So if we are talking about vacation benefits, if we're talking about prepaid legal services, if we're talking about sick leave, paid sick leave, if we're talking frankly about severance pay, and I did not hear EEOC expressing any doubt that severance pay plans do not have a cost component based on age, and therefore should be equally available to older workers.

Now, on the second issue, once you have a plan that is affected by the age of the worker, where the cost does increase with the age of the worker, what kinds of things can the—what kind of proof does the employer have to produce in order to satisfy the exception? And there the agencies, frankly, I think, are bending over to satisfy the employer community, adopted these flexible rules that I referred to earlier that you now hear identified as inconsistencies.

So instead of making the employer adjust his insurance policy every year because of a change in cost, you could do it on a 5-year basis; that you could move people from disability to retirement provided they had—if they had indicated no intent to retire, a reasonable period on disability just like any other worker.

And Congress very carefully, in 3200, does not reraise all these difficult issues, because instead of using a—I heard overly-simplistic equal cost test, what Congress does in this proposed bill is to refer to the regulations. So where the regulations have made this flexible adjustment, once you have a benefit plan that fit within 4(f)(2), Congress codifies that. And I think that is a reasonable response to the kinds of concerns you hear expressed by the business community.

Mr. MARTINEZ. Thank you very much.

Thank you all. Your testimony has been very insightful and very useful to us. We probably will have other hearings as we move towards passage of this bill. The record will remain open for 2 weeks for any further comment. And we remain as your servants, available for any other information you might have for us, any suggestions as we move forward. We thank you again.

We are adjourned.

[Whereupon, at 1:20 p.m., the hearing was adjourned.]

APPENDIX

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

NOV 7 1989

November 6, 1989

The Honorable Edward R. Roybal
The Honorable William Clay
The Honorable Matthew G. Martinez
U.S. House of Representatives
Washington, D.C. 20515

Gentlemen:

Enclosed are Vice Chairman Silberman's and General Counsel Shanor's responses to your follow-up questions to the September 21 hearing on H.R. 3200, the Older Workers Benefit Protection Act.

Please let us know if we can be of further assistance.

Sincerely,

Deborah J. Graham

Deborah J. Graham
Director of Communications
and Legislative Affairs

Enclosure

1. Some business groups opposed to H.R. 3200 have stated that there were no well established standards prior to the Betts decision with regard to the applicability of the Age Discrimination in Employment Act (ADEA) to employee benefit plans. Specifically, these groups claim that the EEOC's "equal cost" regulations were "subject to much litigation," "applied inconsistently," and that "a number of lower courts had previously refused to follow the EEOC's interpretation because it went beyond the plain meaning of the ADEA." Are these groups correct in their analysis of the state of the law prior to the Betts decision?

Before Betts, the courts of appeals agreed that section 4(f)(2) required cost justification. See Reinhart, Interpreting Section 4(f)(2) of the ADEA: Does Anyone Have a "Plan"?, 135 Univ. Pa. L. Rev. 1055, 1060 (1987) ("[i]t [was] clear that section 4(f)(2) [was] not intended to make lawful employee benefit plans that make unequal expenditures for older workers," and that "[a]n employer complies with section 4(f)(2) by spending the same amount on benefits for older workers as for other employees, even if those equal expenditures do not provide equal benefits.").

Much of the pre-Betts litigation in this area focused on issues other than the validity of the "equal cost" principle. One issue involved whether plans established before the passage of the ADEA could fall within section 4(f)(2). See, e.g., EEOC v. Cargill, Inc., 855 F. 2d 682, 686 (10th Cir. 1988). Another issue involved whether the section 4(f)(2) defense applies only to those plans for which the cost of benefits increases with age. See, e.g., EEOC v. Borden's, Inc., 724 F. 2d 1390, 1395-96 (9th Cir. 1984).

Finally, EEOC has not applied the "equal cost" regulation inconsistently. In its amicus briefs in Cipriano v. Board of Education of the City School District, etc., the commission took the position that the "equal cost" principle in the EEOC interpretive guidelines (the "Interpretive Bulletin") should not be automatically imposed as the exclusive test for proving the absence of "subterfuge" in ERI plans because the interpretive guidelines did not address such plans, could not have been intended to cover them, and itself permits exceptions to the "equal cost" principle. The district court agreed with EEOC's position in Cipriano, 700 F. Supp. 1199, 1207-08 (W.D.N.Y. 1988).

2. Some business groups also claim that H.R. 3200 will "outlaw the traditional practice of coordinating retirement plans with other income maintenance contingency benefit programs such as severance pay." Prior to the Betts decision, what was the law with regard to the offset of severance benefits against pension entitlement? Does H.R. 3200 change the pre-Betts law in this regard?

Pre-Betts, the courts decided whether severance and pension benefits were parts of a single, integrated benefit plan on a case-by-case basis, depending on the facts of each case and the weight given to various criteria by the deciding court. See Reinhart, Interpreting Section 4(f)(2) of the ADEA: Does Anyone Have a "Plan"?, 135 Univ. Pa. L. Rev. 1055, 1085 (1987); EEOC v. Borden's, Inc., 724 F. 2d at 1396 (holding that the benefits at issue were not integrated but noting that "a severance pay policy which is an integral part of a complex benefit scheme might be regarded differently."). H.R. 3200 would not change pre-Betts law in this respect. The commission believes that any pre-Betts questions concerning this issue would remain open under this legislation.

H.R. 3200 would codify the EEOC's "benefit package" interpretation. Benefit packaging is a different concept from "integration". "Packaging" of benefits is an exception to the normal issue-by-issue, benefit-by-benefit approach of Title VII and the ADEA toward discrimination and permits some employer flexibility to aggregate like benefits when such grouping would enhance employee welfare. "Integration" of benefits is a term used by some employers to restrict short-term severance pay when employees are eligible to receive vested pension disbursements. This falls outside EEOC's concept of "benefit package." EEOC's interpretive guidelines do not allow packaging of pensions with other benefits, 29 C.F.R. 1625.10(f)(2). The commission has consistently taken the position in litigation that such discrepant benefits as severance pay and pension benefits should not be deemed to be a single, integrated benefit. See, e.g., EEOC v. Borden's, Inc., 724 F. 2d 1390 (9th Cir. 1984) and EEOC v. Westinghouse Electric Corp., 632 F. Supp. 343, 368 (E.D. Pa. 1986), affirmed, 869 F. 2d 696 (3d Cir. 1989), rev'd and remanded, 50 FEP Cases 1495 (S. Ct. Oct. 2, 1989).

3. In your view, taking into consideration the needs of the EEOC, is it necessary for any enacted legislation designed to remedy the Betts decision to be applicable, as is H.R. 3200, to ADEA actions pending on the date of the Betts decision and to actions filed subsequent thereto?

The retroactivity provision in H.R. 3200 would preserve EEOC's pre-Betts position with respect to benefits cases pending on the date of the Betts decision. However, the provision may not protect all aggrieved individuals. For example, it is not clear that the existing provisions would revive actions or proceedings dismissed post-Betts and prior to passage of legislation. It is also not clear that the bill would revive claims not presented to EEOC, or charges in the administrative process, where the statute of limitations expired post-Betts and suit was not filed before the running of the statute because no cause of action existed post-Betts. We are not addressing the constitutional problems which may be created by retroactive application of H.R. 3200 to actions which have already passed into final judgment. See McCullough v. Virginia, 172 U.S. 102, 123-24 (1898) ("It is not within the power of a legislature to take away rights which have been once vested by judgment."); Tonya K. v. Board of Education of Chicago, 847 F. 2d 1243, 1247-48 (7th Cir. 1988).

4. Several questions have arisen as to how certain employee benefit plan practices are treated under the pre-Betts EEOC interpretive bulletin. Please indicate whether the following practices would be acceptable (why or why not) under the EEOC's interpretations prior to the Supreme Court's decision:

A. Social security supplements -- a special benefit granted to individuals who retire before they are eligible to start drawing Social Security benefits that ceases once the individual is eligible for Social Security.

For purposes of your analysis, does it make a difference if the benefit is a permanent part of the defined benefit pension plan or is a separate benefit?

B. Offsetting severance benefits by the amount of benefits that an individual is entitled to under the pension plan.

Does it make a difference if the offset is required only for those individuals eligible to retire or would it be acceptable to consider the present value of the deferred vested benefit a younger worker might receive as well?

C. A window benefit program -- offered to a limited group of individuals for a limited period of time.

Does it make a difference if the program is offered only to certain workers (i.e., age 60 through 65)?

A. An employer did not violate EEOC pre-Betts interpretations by taking into account benefits provided by the government even if these benefits were available based on age. (See 29 C.F.R. section 1625.10(e)). So long as the employer-provided benefits and the government-provided benefits together were not less for the older than for the younger worker, under section 1626.10(e) there would be no ADEA violation. Thus, an employer could cease a social security supplement when an individual became eligible for a commensurate government-provided benefit, so long as the total benefit for the older employee was not less than that for a similarly-situated younger employee. It was irrelevant under section 1625.10(e) whether the benefit was part of a defined-benefit pension plan or a separate benefit; the focus was on the total benefit, employer-provided plus government-provided.

B. Pre-Betts, the commission took the position that reducing a retirement-eligible employee's severance pay by the actuarial value of his pension, while not reducing the severance pay of a nonretirement-eligible employee, denies a benefit -- full severance pay -- to an older employee solely because of age. Such a practice, EEOC argued, was analogous to providing a nonretirement-eligible employee severance pay while denying it to a retirement-eligible employee, a position the commission opposed in EEOC v. Westinghouse Electric Corp., 632 F. Supp. 343 (E.D.Pa. 1986), affirmed, 869 F. 2d 696 (3rd Cir. 1989), rev'd and remanded, 50 FEP Cases 1495 (S. Ct. Oct. 2, 1989). Where severance pay for both retirement-eligible and nonretirement-eligible employees is reduced by the actuarial value of each employee's pension, a younger employee receives a large lump sum, while an older employee with equal seniority receives much less cash and a promise of future annuities, which, if he lives long enough, may equal the lump sum received by the younger employee. The commission unsuccessfully argued in Abenante v. Fulflex, Inc., 701 F. Supp. 296 (D.R.I. 1988), affirmed post-Betts, No. 89-1180 (1st Cir. Sept. 20, 1989), that this payment of a greater amount of severance pay to a younger employee while paying an older employee with equal seniority less severance pay violates the ADEA.

C. The Interpretive Bulletin did not specifically address "window benefit" programs having age caps or age brackets. Generally, such programs were prima facie unlawful pre-Betts under section 4(a)(1) and were permissible only if a section 4(f)(2) defense were established. The commission in the Cipriano case took the position that the plan in issue, an ongoing, age-bracketed voluntary early retirement incentive program available to each employee which was justified by legitimate business reasons, was not a "subterfuge to evade the purposes" of the ADEA. The district court agreed. Cipriano, 700 F. Supp. 1199 (W.D.N.Y. 1988). Neither the Interpretive Bulletin nor any amicus brief filed by the commission has dealt with a limited time period voluntary early retirement incentive program offered only to workers of certain ages. On a related issue, the commission argued as amicus in Paollilo v. Dresser Industries, 821 F. 2d 81 (2d Cir. 1987), that if the time period is unduly short, an employer may have coerced the employee into unlawful involuntary retirement.

5. As was evident at the hearing, significant confusion exists about what is permitted in the context of an early retirement incentive program. In order to clarify the issues, please address the following:

A. How is an early retirement incentive program different from an early retirement feature of an ongoing pension plan?

B. In the context of a defined benefit plan, could an early retirement benefit violate the ADEA? Would an actuarial reduction to take into consideration the longer payout period for younger workers violate the ADEA? Would an actuarial reduction for a qualified joint and survivor annuity that, of course, varies based not only on the age of the participant but also the participant's spouse, violate the ADEA?

C. What are the characteristics of a voluntary early retirement incentive program? How is it distinguished from an involuntary one?

D. Is a "window benefit" a voluntary early retirement incentive program?

E. The IB adopted by the EEOC clearly indicates that cost is the only legal justification for differentiation in employee benefit plans based on age. What legal authority do you have for the EEOC position advanced in your brief in Cipriano v. Board of Educ. of City School Dist. when it was remanded to the District Court?

How specifically would you define a "legitimate business reason" for structuring an employee benefit plan with age-based differentiations? Does it matter what type of an employee benefit plan the employer is trying to justify?

A. There is no clear delineation between early retirement incentive programs and early retirement features of an ongoing pension plan. Both offer incentives to retire rather than continue working.

B. Pre-Betts, an early retirement benefit could violate the ADEA in the context of a defined benefit program. For example, it could be involuntary, a "take-it-or-else" offer from the employer. Or it could withdraw benefits from older workers while continuing to offer them to younger workers, as in Karlen v. City Colleges of Chicago, 837 F. 2d 314 (7th Cir.), cert. denied sub nom., Cook County College Local 1600 v. City Colleges of Chicago, 108 S. Ct. 2038 (1988). An actuarial reduction to take into consideration the longer expected payout period for younger workers, if tied to the actual longevity prediction, was not unlawful pre-Betts. See the commission's brief in Abenante v. Fulflex. If actuarially justified, a joint and survivor annuity which takes into account the participant's and the participant's spouse's ages would not violate the ADEA.

C. A voluntary early retirement incentive (ERI) program offers eligible employees the opportunity to participate and the opportunity to make a reasoned decision whether to participate. Factors that bear on determining voluntariness include whether the employer provides accurate information about the plan and related benefits, honest information about job prospects with the company to the best of its knowledge, sufficient time for the employee to make a considered decision, and whether it assures employees that they are free to decline the offer.

Where, instead, the employer offers an incentive in such a coercive manner that reasonable people would feel constrained to accept it, a consequent retirement will be deemed to be involuntary, in violation of section 4(a)(1) of the ADEA. See, e.g., Bodnar v. Synpol, Inc., 843 F. 2d 190, 193-94 (5th Cir.), cert. denied, 109 S.Ct. 260 (1988); Paollilo v. Dresser Industries, 821 F. 2d 81, 84 (2d Cir. 1987); Henn v. National Geographic Society, 819 F. 2d 824, 828-29 (7th Cir.), cert. denied, 108 U.S. 454 (1987).

D. By "window benefit," we understand you to mean a benefit offered to a limited group of persons for a limited period of time. Such a benefit may be an early retirement incentive.

E. In its briefs in Cipriano, the commission took the position that the "equal cost" principle should not be automatically imposed as the exclusive test for proving the absence of "subterfuge" in ERI plans because the EEOC interpretive guidelines did not address such plans, could not have been intended to cover them, and itself permits exceptions to the equal cost principle. See Memorandum of Law for the Equal Employment Opportunity Commission as Amicus Curiae, filed on July 31, 1987 in Cipriano v. Board of Education of City School District, etc., at pages 26-29. In the commission's view, a similar exception is warranted in the case of bona fide voluntary ERI plans that further the purposes of the ADEA.

The commission followed the Second Circuit's holding in Cipriano that "'the employer must show a legitimate business reason for structuring the plan as it did'" in order to prove that an ERI plan is not a subterfuge to evade the purposes of the ADEA. Memorandum at 32, quoting Cipriano v. Board of Education of City School District, etc., 785 F. 2d 51, 58 (2d Cir. 1986).

We explained that this burden would most effectively be met where the specific age limitations are based on and reasonably supported by some objectively measured assessment of increasing cost and/or declining benefit to the employer in providing the retirement incentives. See Memorandum at pages 33-34.

Finally, the commission argued that the Cipriano program was entitled to an exception from the "equal cost" analysis of section 4(f)(2) because it was voluntary and an early retirement incentive program.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

November 6, 1989

The Honorable Marge Roukema
Ranking Minority Member
Subcommittee on Labor-Management Relations
U.S. House of Representatives
Washington, D.C. 20515

Dear Ms. Roukema:

I am responding to your September 21 request on behalf of Rep. Harris Fawell to answer several hearing follow-up questions from the September 21 hearing on H.R. 3200 and the recent Betts decision.

Part I: Reach of the Legislation

1. It is my understanding that H.R. 3200 would completely prohibit any age-based distinctions in benefit plans with only one exception -- the cost justification exception -- which says that an employer can make age-based distinctions if the employer can prove that the actual amount of payments made or cost incurred on behalf of each older worker covered by a particular benefit plan is no less than that made or incurred on behalf of all younger workers covered by that plan. Is my understanding correct?

Generally yes. However, section 4(f)(2)(B) would allow an employer to incur greater costs or make greater payments on behalf of older workers.

2. It is clear that the burden is on the employer to prove the cost-justification defense, is it not? In other words, whenever a benefit plan is challenged in a law suit, the employer must prove the defense, correct?

Under the proposed legislation, the employer must prove the elements of the defense if the plaintiff has first proved that the employer provides lesser benefits to older protected age group workers.

3. Now, if there were a retirement program of some kind in which there were age-based distinctions, and if the employer failed to prove the cost justification defense, then the retirement program would be unlawful under the Age Discrimination in Employment Act, would it not?

Yes, if the age based distinctions disfavored older workers.[1]

4. If the retirement program were unlawful under the ADEA, then it would become subject to lawsuits by younger workers. Would it not? How would older workers be protected by this bill then?

Retirement programs with greater costs incurred or payments made on behalf of older workers will not be unlawful under H.R. 3200.

5. In Abenante v. Fulflex in the First Circuit Court of Appeals, the EEOC argued against the use of actuarial values to show the amount of the benefit received by older workers, reasoning that an individual worker might not live to receive the actuarially predicted amount. Yet defined benefit retirement plans are currently funded on the basis of actuarial predictions of future benefit requirements. Would employers be permitted under this bill to use actuarial tables to cost justify their plans?

Yes, but the difference in benefits provided to the older worker must be justified by the actuarial prediction. The EEOC argued in Abenante v. Fulflex that age distinctions in a benefit plan discriminate under section 4(a)(1) of the ADEA even if they are based on actuarial tables, but such age distinctions may be justifiable under section 4(f)(2). In other words, actuarial predictions could be used to justify discrimination under redesignated section 4(f)(2)(B) of the bill, but could not be used to determine whether discrimination had occurred under section 4(a). Following this approach in Fulflex, EEOC did not challenge the use of actuarial predictions in the company's retirement plan. However, the EEOC did challenge the company's separate severance pay plan because the discrimination was not justified by actuarial predictions: severance pay is typically not based on an employee's age and predicted life span but is instead based on years of service and salary.

6. Do you think an employer can have a retirement program in which pension funds are reserved for older workers, but the employer is barred from asking the age of any worker who wants to

---

[1] We note that section 4(i) of the Act, added in 1986, provides detailed rules for pension plans with respect to accruals and allocations. Additionally, the Act's legislative history clearly indicates that the ADEA is to be read harmoniously with ERISA, which provides a comprehensive scheme of pension benefit plan protections for employees.

quit and begin drawing a pension?

No. Nothing in H.R. 3200 prohibits an employer from designing a pension plan around a "normal retirement age" in which that age is the earliest point benefits may be received.

Part II: Cost Justification as an Exclusive Defense

1. Under the cost justification defense provided in the bill, age distinctions are only lawful if the employer shows that the amount spent on each older worker in a particular benefit plan is no less than the amount spent on any younger worker. Is that correct?

Yes. However, EEOC successfully argued in Cipriano v. Board of Education, etc. that an early retirement incentive (ERI) program that violated section 4(a), but which was completely voluntary and justified by legitimate business reasons, was lawful. We believe that H.R. 3200 should provide that ERI programs that are voluntary and further the purposes of the ADEA as set forth in section 2(b) remain lawful.

2. By stating that the amount spent on an older worker must be no less than that spent on a younger worker, the bill appears to require individual cost data rather than any group data. This defense sounds as if any individualized cost data can be used to prove the defense. Is my interpretation correct?

No. The Interpretive Bulletin uses the same comparison of an older worker with a younger worker, but permits the use of group data to estimate cost. Section 1625.10(a)(1) of the IB provides that benefit levels to older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. Section 1625.10(d)(3) provides a way for employers to approximate costs without having to run the risk of litigation over whether the costs for older and younger workers are approximate equivalents.

The IB provides that employers may rely on cost data for groups of similarly situated employees. 29 C.F.R. section 1625.10(d)(1). It further provides that cost comparisons and adjustments under Section 4(f)(2) may be made on the basis of age brackets of up to five years. 29 C.F.R. section 1625.10(d)(3). The preamble to the I.B. noted that five-year bracketing to determine average costs was in accordance with longstanding

insurance industry practice. 44 Fed. Reg. 30652 (May 25, 1979). These provisions of the EEOC's interpretive regulations would be unaffected by the proposed legislation.

3. Are all benefit plans in the United States susceptible to this kind of proof?

Many benefit plans cannot be cost justified (i.e., vacation plans). These types of plans cannot benefit from section 4(f)(2)(B) and, pre-Betts, could not have benefited from section 4(f)(2).

4. What kind of cost data will suffice?

Generally accepted actuarial tables can be utilized to justify differences in older workers' benefits as long as the amount of the difference can be justified by the difference in cost due to actuarial factors.

6. (There was no question #5.) I am trying to understand what kinds of age distinctions EEOC likes and which ones it doesn't like. Let's look at the case of Abenante v. Fulflex in the First Circuit Court of Appeals. In that case, the EEOC argued against the use of actuarial values to show the amount of the benefit received by older workers. The Commission argued that:

> **while the calculation of present value may involve a true actuarial generalization. . . [m]any older employees . . . will not live to collect their full retirement benefits.**

Yet defined benefit retirement plans are funded on the basis of actuarial predictions of future benefit requirements.

A. Would employers be permitted under this bill to use actuarial tables to cost justify their plans?

Yes. The sentence quoted from the Commission's brief in Abenante v. Fulflex addressed the question of whether an age distinction based on actuarial tables discriminated against individual older employees under section 4(a)(1) and not whether the distinction was justified under section 4(f)(2). To the extent that the cost of benefits varies according to age and life span, employers would be able to use actuarial tables to justify the difference in cost.

B. Do you think retirement plans can be administered without

the use of actuarial tables?

Generally no. Funding and benefit levels of retirement plans often must be based on actuarial tables.

7. Would the 5 year age brackets permitted under the Interpretive Bulletin be allowed under the bill?

Yes.

8. What about the "safe harbor" provided in EEOC's Interpretive Bulletin for long-term disability benefits? According to the Bulletin, an employer does not violate the Age Discrimination in Employment Act if the program makes the following age-based distinctions:

> **--with respect to disabilities which occur at age 60 or less, benefits may be ended at age 65**
>
> **--with respect to disabilities which occur after age 60, benefits may be ended 5 years after disablement.**

Would those age-based distinctions still be permitted under the bill? Can you tell me under what conditions these age-based distinctions would be unlawful under the bill?

The age-based distinctions set out in the Interpretive Bulletin addressing long-term disability benefits would still be permitted under the bill. It should be noted, however, that the "safe harbor" in question was promulgated at a time when the ADEA permitted mandatory retirement at age 70. The fact that the Act's age 70 cap has since been lifted may warrant further study of the continuing validity of the safe harbor. See Question #3 in the Commission's Advance Notice of Proposed Rulemaking on Employee Benefit Plans, 53 Fed. Reg. 26789 (July 15, 1988) (copy attached).

The safe harbor distinctions would be unlawful under the bill only if it can be shown that the present distinctions are not cost justified, that is, new evidence is produced to demonstrate that the cost expended in providing coverage until age 65 for persons disabled at age 60 or less would secure coverage in excess of five years for persons disabled after age 60. If such evidence were available, the safe harbor could be modified accordingly. We see nothing in the bill, however, that supports an argument that employers would be required to keep older workers on disability benefits for life.

Part III: Retroactivity

1. One of the Commission's attorneys recently gave a speech in which she said that there were about 30 court cases and more than 500 charges pending that are directly affected by the Betts case. Is that an accurate assessment? [NOTE: EEOC now has a new computerized national database to track all of the pending charges, so they should be able to retrieve this information rather quickly.]

There are about 30 court cases and about 400 charges pending that involve employee benefit issues under the ADEA. Many of these will prove to be affected by Betts. Some will not. We cannot provide more detailed information on the charges until they have been fully investigated.

2. Would you please provide for the hearing record a list of the cases that are now pending in court, including the precise issue involved in each case?

a. Alcan Rolled Products Co., N.D. WV, No. 88-0133-C. Retirement incentive plan resulted in greater periodic benefits for retiring employees ages 55-64 than those age 65 and older.

b. Allis-Chalmers Corp., N.D. IN, No. S85-694. Plant closing agreement which provided severance benefits to all laid-off employees except those eligible for immediate pensions.

c. American Can Company, E.D. PA, No. 87-6445. Special separation plan provided 2 years of "augmented service credit" to employees ages 50-54, but not those age 55 or older.

d. AT&T, D. NJ, No. 88-1024(CSF). Voluntary termination pay plan restricted to employees under age 65, and paid only reduced benefits to employees ages 61-64.

e. Bethlehem Steel Corporation, E.D. PA, No. 88-0175. Policy of denying severance benefits to permanently laid-off employees who were eligible to receive immediate pensions.

f. Cargill, Inc., D. KS, No. 81-4193. Pet. for Rehearing Pending, 10th Cir., No. 84-2692. Policy of denying long-term disability benefits to employees who become disabled after attaining age 60.

g. Chrysler Corporation, S.D. NY, No. 89-CIV-1347.

Permanently laid-off employees who elected a "special early retirement" option were denied severance pay upon termination.

h. City Colleges of Chicago, N.D. IL, No. 88 C 10726, filed Dec. 22, 1988. Voluntary retirement incentive benefits drastically reduced at age 65.

i. City of Clearwater, M.D. FL, Co. 88-1154-CIV-T-15A. Refusal to allow new employees age 45 or older to join a pension plan, or at least to incur equal pension costs on their behalf.

j. City of Mt. Lebanon, W.D. PA, No. 86-438, filed Feb. 26, 1986. Policy of cutting disability benefits for police officers at age 55, and of denying benefits to those disabled after that age.

k. Easter Seal Society of Arizona, D. AZ, No. CIV87-1935 PHX. Defined benefit pension plan failed to credit employee salary increases which occurred after an employee attained age 60.

l. Farmer's Group, C.D. CA, No. 86-6362 TJH. Policy of denying profit sharing contributions and forfeiture allocations to employees working beyond age 65.

m. Fulflex, Inc., D. RI, No. 87-0456B. Appeal dismissed, 1st Cir., No. 89-1179 & 1180. Reducing severance benefits by the "present value" of accrued pension benefits. Appeal dismissed post-Betts.

n. Los Angeles Unified School District, C.D. CA No. CV88-05865. Policy of cutting off disability benefits at age 60, and denying such benefits to employees disabled after attaining that age.

o. Maryland National Capital Park and Planning Commission, D. MD, No. PN -86-3218. Policy of discontinuing disability benefits when eligible for regular retirement benefits (no later than 55).

p. Nebraska Public Employees Retirement System, D. NE, No. 87-0-681. Retirement eligible employees denied the same right as younger employees to withdraw their contributions to a pension system.

q. North American Phillips Lighting Corp., D. NJ, No. 87-3671. Policy of denying severance benefits to those employees only who are eligible for immediate pensions when laid off.

r. Northwest Airlines, Inc., W.D. WA, No. 85-36W. One of the issues in this case involves a policy of denying some pension contributions for pilots working beyond age 60.

s. Oscar Mayer Company, E.D. PA, No. 88-6904,. Policy of denying severance benefits to employees who elect to receive immediate pensions after being permanently laid off.

t. Public Employees Retirement System Board of Ohio, S.D. OH, No. C-1-87-216. Challenge to a state law which denies disability retirement for employees who become disabled after attaining age 60.

u. Radio Free Europe/RL, D. DC, No. 89-153-LFO,. One of the issues in this case involves a policy of denying severance benefits to employees working beyond age 65.

v. Sierra Community College, E.D. CA, No. 89-0352. One-time retirement incentive offer provided larger payments to retiring employees ages 55-59, than to those age 60 and older.

w. United Air Lines, Inc., N.D. IL, No. 85 C 8375. Long term disability benefits cut off when employees attain age 60, and denied to employees disabled after attaining that age.

x. United Air Lines, Inc., N.D. IL, No. 88 C 5081. Medicare eligible employees age 65 or over denied the option of converting to individual health insurance coverage termination.

y. United States Steel Corporation, W.D. PA, No. 87-2044. Challenge to various age discriminatory provisions for layoff benefits.

z. Wappingers Central School District, S.D. NY, No. 87-CIV-5594. Policy of denying teachers payment for unused sick leave unless they retire before attaining age 60.

aa. Washington County Board of Education, S.D. OH, No. C-1-88-845. Challenge to a state law which denies disability retirements for employees who became disabled after attaining age 60.

bb. Western Union Telegraph Company, S.D. NY, No. 88-CIV-6995. Policy of reducing the amount of severance benefits paid to laid-off employees who are eligible for immediate pensions.

cc. **Westinghouse Electric Corporation**, D. NJ, No. 80-8053,. Appeal Pending, 3rd Cir., No. 87-5174. Policy of denying severance benefits to permanently laid-off employees who were eligible for pensions.

dd. Westinghouse Electric Corporation, E.D. PA, No. 83-5457. Appeal Pending, 3rd Cir., No. _______. Severance benefits denied to employees who were eligible for immediate pensions.

ee. Wheeling-Pittsburgh Steel Corp., S.D. OH, No. C-2-88-729. Collective bargaining agreement had the effect of denying supplemental unemployment benefits to all employees over age 50.

ff. Wilson Foods Corp., N.D. IL, No. 88-C-4056. Severance pay denied to retirement-eligible employees who elected immediate pensions when a plant permanently closed.

3. In the pending cases which would be affected by Betts, hasn't EEOC's strategy been to file motions for stays asking the court to withhold judgment and await this legislation? Is that common practice for the Commission, keeping a lawsuit on hold until such time as EEOC is able to persuade Congress to enact a law more in keeping with EEOC's philosophy?

The EEOC has filed motions to stay certain cases pending congressional action on H.R. 3200. H.R. 3200 was initiated by Congress and not by the EEOC. As part of the Administration, EEOC coordinates its positions on legislation with other entities of the Executive Branch through the Office of Management and Budget. The Administration does not attempt to persuade Congress to enact laws in order to keep lawsuits viable.

We are not addressing the constitutional problems which may be created by retroactive application of H.R. 3200 to actions which have already passed into final judgment. See McCullough v. Virginia, 172 U.S. 102, 123-24 (1898) ("It is not within the power of a legislature to take away rights which have been once vested by judgment."); Tonya K. v. Board of Educ. of Chicago, 847 F. 2d 1243, 1247-48 (7th Cir. 1988).

4. We seem to have a situation here in which the law would be changed, and then applied retroactively to benefit plans that might have been legal under the EEOC's interpretation; but which would be illegal under the new law. Are you troubled by that?

Besides early retirement incentive (ERI) plans (see above at Part II, answer 1) we are unable to discern what plans "might have been legal under EEOC's interpretation" that would "be illegal under the new law." With the exception of ERI plans, the bill restores EEOC's interpretation of what the ADEA requires in the area of employee benefit plans.

5. The bill would also be immediately effective on the date of enactment, right? Since there is no "grace period," seniority systems and employee benefit plans which were lawful on the day before enactment, but cannot meet the strict requirements of the bill, will be immediately vulnerable to suit, isn't that right? Are you bothered by that?

Yes, the bill would be immediately effective on the date of enactment. Employee benefit plans that EEOC and lower federal courts considered unlawful pre-Betts will likely be vulnerable to suit. Of course, H.R. 3200 merely restores employers' pre-Betts obligation not to discriminate in the provision of fringe benefits based upon age except where benefits cost more for older workers. The Labor Department, EEOC, and every federal court decision before the Supreme Court decision in Betts had construed the ADEA as imposing this obligation upon the vast majority of employers, particularly those whose plans have been created or amended over the past twenty years. Thus, only the employer which ignored pre-Betts agency and judicial guidance or which began post-Betts to discriminate in the benefits area will be affected by H.R. 3200's immediate effective date.

As to seniority systems, bona fide seniority systems have not, to EEOC's knowledge, been challenged under the Act. They generally do not discriminate against older workers.

6. The bill would add a new paragraph (k) to section 4 of the ADEA. This new provision states that:

> **A seniority system or employee benefit plan shall comply with this Act regardless of the date of adoption of such system or plan.**

In other words, a seniority system or benefit plan that does not comply with this Act regardless of the date of adoption of such system or plan is just that, not in compliance with the Act and therefore vulnerable to a law suit. Please explain for me your understanding of the relationship between Section 5(b) of the bill and this new paragraph (k) that would be added to the ADEA. It seems to me that litigation under this bill would not be limited to proceedings described in Section 5(b). Rather, any seniority system, any employee benefit plan that does not comply with the Act

regardless of the date of adoption would become vulnerable to a lawsuit even if no charge were currently pending. Is that not correct?

Under new paragraph 4(k), present age discrimination pursuant to a bona fide employee benefit plan that is not justified by equal costs, or pursuant to a bona fide seniority system intended to evade the purposes of the Act, is actionable even if the benefit plan or seniority system was adopted before the effective date of the ADEA (i.e., 1967). After passage of H.R. 3200, such a plan or system could be challenged in court only if the Act's statute of limitations and charge-filing requirements were satisfied. See sections 7(d), 7(e)(1), and 14(b). Under section 5(b), the provisions of H.R. 3200 would retroactively apply to an age discrimination action or proceeding challenging present discrimination under such plan or seniority system if the action or proceeding was brought under the ADEA after June 23, 1989, or was brought prior to June 23, 1989 and was still pending on June 23, 1989.

Part IV: Seniority Systems

1. This bill would also change the law with regard to seniority systems, would it not?

No.

2. Under existing law, a seniority system which is not a subterfuge to evade the ADEA is exempted from the Act, right?

Not necessarily. Section 4(f)(2) protects only "bona fide" seniority systems and only those bona fide systems which do not require or permit the involuntary retirement of any individual specified by section 12(a) of the Act because of the age of the individual.

3. And also under existing law, a seniority system which was adopted prior to the ADEA's enactment in 1967 is immune from attack because it could not possibly have been designed as a subterfuge to evade a statute that did not yet exist, right?

Not necessarily. As explained below in answer 5, there is no "existing law" to our knowledge that generally immunizes pre-Act seniority systems. Even if there were, a pre-ADEA seniority system that permits the involuntary retirement of any individual specified by section 12(a) of the Act because of the age of the individual would not be protected by section 4(f)(2) of the ADEA. Also, discrimination resulting from post-1967 seniority system modifications may be actionable under the ADEA.

4. Now, this bill would change the exemption for seniority systems to read "not intended to evade" the ADEA, is that right?

Yes, the exemption would read "not intended to evade the purposes of" the ADEA.

5. And the bill would also abolish the exemption for pre-Act plans, wouldn't it?

On its face, the ADEA contains no exemption for pre-Act plans. The Supreme Court in United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977), concluded that a pre-Act bona fide employee benefit plan (not seniority system) could not have been intended to evade the purposes of the ADEA and hence could not be a subterfuge to evade the purposes of the Act [the Court equated subterfuge with intent to discriminate]. This "exemption," applies only to bona fide employee benefit plans eligible for the section 4(f)(2) defense. H.R. 3200 would apply the ADEA equally to all employee benefit plans and seniority systems.

Please let me know if you have any questions.

Sincerely,

Charles A. Shanor

Charles Shanor
General Counsel

cc: The Honorable Harris Fawell

Betts Case /

UNUM.

2211 Congress Street
Portland, Maine 04122
(207) 770-2211

September 20, 1989

The Honorable Edward Roybal
The Honorable Augustus Hawkins
The Honorable William Clay
The Honorable Matthew Martinez
The Honorable James Bilbray
U.S. House of Representatives
Washington, DC 20515

Dear Representatives Roybal, Hawkins, Clay, Martinez, and Bilbray,

In response to the decision of the Supreme Court in Public Employees Retirement System of Ohio v. Betts, you introduced H.R. 3200 to restore the original Congressional intent in passing and amending the Age Discrimination in Employment Act of 1967 (ADEA).

UNUM Corporation and its family of insurance companies (UNUM), the nation's leading provider of group long term disability insurance, generally support this intent and H.R. 3200.

Based in Portland, Maine, UNUM provides group long-term disability insurance to more employers than any other insurer in the United States. UNUM insures approximately three million workers under 28,245 group long term disability policies.

UNUM has worked closely with the Department of Labor in establishing age-based reducing benefit duration schedules in long term disability plans that comply with the ADEA. In May, 1979, the DOL cited our reducing benefit duration schedule as an example of a cost-justified age reduction benefit schedule. The age-related cost justification methods involved in establishing our schedules and the industry's safe harbor (as allowed by the ADEA and the Department of Labor's 1979 Interpretive Bulletin) have proved to be valid, reasonable and workable.

We do, however, offer the following recommendation on H.R. 3200 to avoid increased litigation and incorrect interpretations of the ADEA:

> INCORPORATE SPECIFICALLY SUBSECTIONS (d)(1), (d)(2), (d)(3), AND (f) OF SECTION 1625.10, TITLE 29, CODE OF FEDERAL REGULATIONS (CFR) INTO THE ADEA RATHER THAN INCORPORATING SECTION 1625.10 IN ITS ENTIRETY.

> These are the subsections relevant to the intent of H.R. 3200 and address cost data and cost comparisons made on a benefit-by-benefit basis and a benefit package basis.

We understand that the intent of referencing Section 1625.10 of the CFR in H.R. 3200 is to incorporate into the ADEA those subsections applicable to and permitting individual benefit and benefit package cost comparisons. However, by referencing the entire 1625.10 section, a court, employer, or insurer could determine that the entire 1625.10 section is incorporated into the ADEA. This presents the following problem:

Section 1625.10 Defines The Term "Subterfuge".

Subsection (d) of Section 1625.10 of the CFR uses and defines the term "subterfuge". H.R. 3200 deletes the term "subterfuge" from §4(f)(2) of the ADEA. H.R. 3200 does this by adding a new subsection, §4(f)(2)(B), which states that a bona fide employee benefit plan is not unlawful if the "actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker." However, by referencing the entire 1625.10 section, H.R. 3200 incorporates into the ADEA not only the term it seeks to delete, but also a subterfuge definition that is different from the language in §4(f)(2)(B) stated above.

Therefore, by specifically incorporating subsections (d)(1), (d)(2), (d)(3), and (f) of Section 1625.10 of the CFR, H.R. 3200 accomplishes the following:

1. Avoids possible statutory interpretation problems created by incorporating the term "subterfuge" and its accompanying definition found in subsection (d) of Section 1625.10 of the CFR into the ADEA.

2. Clarifies that the "approximate equivalency" standard of cost comparison between younger and older employees used in subsection (d)(3) of Section 1625.10 of the CFR is the standard H.R. 3200 intends when it states in §4(f)(2)(B) of the ADEA that the "actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker." (Emphasis added.) In other words, the "no less than" cost comparison language in the ADEA means the "approximate equivalency" cost comparison standard established in subsection (d)(3) of Section 1625.10 of the CFR.

We thank you for the opportunity to present our recommendations.

Sincerely,

Kevin McCarthy (cw)

Kevin McCarthy
Second Vice President
LTD Products/Markets

LEADERSHIP COUNCIL
of
AGING ORGANIZATIONS

Horace B. Deets, Chairman

September 21, 1989

The Honorable Edward R. Roybal
United States House of Representatives
Washington, DC 20515

Dear Representative Roybal:

Legislation is urgently needed to protect older workers from arbitrary age discrimination in employee benefit plans following the Supreme Court decision in Public Employees Retirement System of Ohio v. Betts. This would be accomplished by S. 1511 and H.R. 3200, which you have introduced, by restoring the law prior to this ruling. We express our strong support for it.

The Betts decision created an upheaval in settled law when it rejected wholesale the application of the Age Discrimination in Employment Act of 1967 to employee benefit plans. This ruling opens a Pandora's box for unequal treatment of older workers in a company's pension plans, retirement programs, and numerous fringe benefits.

For 20 years prior to Betts both the courts and federal agencies had applied the IDEA to employee benefit plans, and had interpreted an exception under section 4(f)(2) of the law quite narrowly. This interpretation allowed discriminatory provisions in such plans only for demonstrated differences in an employer's costs or for a similarly rigorous business justification.

Employers as well have accepted the Act's general application to benefit plans. We believe that the prohibition of arbitrary age discrimination in all facets of employment, including benefit plans, is a principle which is widely shared by employers and is beyond dispute today.

Enclosed for your further review is an analysis of the Betts decision prepared by Burton Fretz of the Senior Citizen Law Center. We strongly support the legislation which you have introduced and urge its prompt passage by the Congress.

Sincerely,

Horace B. Deets

Horace B. Deets

1909 K Street, N.W., Washington, D.C. 20049 • (202) 728-4725

THE LEADERSHIP COUNCIL OF AGING ORGANIZATIONS (LCAO)

American Association for International Aging
American Association of Homes for the Aging
American Association of Retired Persons
AFL-CIO Department of Occupational Safety, Health and Social Security
AFSCME Retiree Program
American Society on Aging
Associacion Nacional Pro Personas Mayores
Association for Gerontology in Higher Education
Catholic Golden Age
Families, USA
Gerontological Society of America
Gray Panthers
National Association for Families Caring for their Elders, Inc.
National Association of Area Agencies on Aging
National Association of Foster Grandparents Program Directors
National Association of Meal Programs
National Association of Older American Volunteer Program Directors
National Association of RSVP Directors, Inc.
National Association of Retired Federal Employees
National Association of Senior Companion Project Directors
National Association of State Units on Aging
National Caucus and Center on Black Aged, Inc.
National Council of Senior Citizens
National Council on the Aging, Inc.
National Hispanic Council on Aging
National Interfaith Coalition on Aging
National Pacific/Asian Resource Center on Aging
National Senior Citizens Law Center
Older Women's League
United Auto Workers Retired Members Department

RESPONSE TO COMMENTS ON THE OLDER WORKERS BENEFIT PROTECTION ACT

The Supreme Court decision in Public Employees Retirement System of Ohio v. Betts, 57 U.S.L.W. 4931 (June 23, 1989) serves, in the words of Justice Marshall in dissent, to "immunize virtually all employee benefits programs from liability under the Age Discrimination in Employment Act ...." This ruling creates confusion and uncertainty for older workers who no longer can count on a range of employee benefits in the future. The Older Workers Benefit Protection Act, S. 1511 and H.R. 3200, will restore a settled, twenty-year interpretation of the ADEA.

Comments on this legislation have been submitted under the auspices of the Association of Private Pension and Welfare Plans. While these comments do not challenge the basic principle that employee benefit plans must be free from age discrimination, they do suggest a misunderstanding of the effect of this legislation and of the history of ADEA enforcement. In addition, the comment's legitimate concerns about voluntary early retirement programs are fully accommodated in this legislation.

I. THE BETTS DECISION REVERSED A TWENTY-YEAR CONGRESSIONAL AND ADMINISTRATIVE POLICY REQUIRING A COST JUSTIFICATION UNDER THE ADEA IN ORDER TO PERMIT A DISCRIMINATORY PROVISION IN AN EMPLOYEE BENEFIT PLAN.

Opponents of this legislation have suggested that the Equal Employment Opportunity Commission (EEOC) interpretation of Section 4(f)(2) of the ADEA is a relatively recent innovation at odds with the original congressional intent in enacting the exception. This arises from an erroneous view of both regulatory and legislative history.

First, the EEOC equal cost standard was adopted shortly after passage of the ADEA in 1967 and not, as opponents suggest, twelve years later. The ADEA became effective on June 12, 1968. On June 21, 1969, the Department of Labor, which originally administered the Act, issued an interpretation of Section 4(f)(2):

> "An employer may provide lesser amounts of insurance coverage under a group insurance plan to older workers than he does younger workers, where the plan is not a subterfuge to evade the purposes of the Act. A retirement, pension, or insurance plan will be considered in compliance with the statute

> where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits or insurance coverage." 29 C.F.R. 860.120(a) (1969); 34 Fed. Reg. 9709 (1969).

The EEOC adopted the Department of Labor interpretation of Section 4(f)(2) when it assumed responsibility for ADEA enforcement in 1979. Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1978). See 29 C.F.R. 1625.10(a)(1).

Second, opponents of the legislation argue that the Betts decision embodies the original congressional intent in enacting Section 4(f)(2), because Senator Javits, in sponsoring this provision, stated that it was his purpose to provide that the regulation of employee benefit plans would occur under separate ERISA legislation. This statement is the opposite of legislative history. While Senator Javits believed that the ADEA was not the place to "fight the pension battle," 113 Cong. Rec. 7076 (1967), at the time he was not suggesting open-ended discrimination in employee benefit plans. Rather, he recognized how certain pension plans had long periods of up to twenty-years before benefits vested, and he urged that such requirements be changed comprehensively through pension legislation rather than piecemeal in the ADEA.

In offering an amendment similar to Section 4(f)(2) in 1967, Senator Javits stated explicitly that "an employer will not be compelled to afford older workers exactly the same pension, retirement, or insurance benefits as younger workers and thus employers will not, because of the often extremely high cost of providing certain types of benefits to older workers, actually be discouraged from hiring older workers." 113 Cong. Rec. 31,254-31,255 (1967).

When the ADEA was amended in 1978 Senator Javits reaffirmed his intention that an economic justification is required in order to shield discrimination in employee benefit plans: "[B]enefit levels for older workers may be reduced only to the extent necessary to achieve approximate equivalency in contributions for older and younger workers." 124 Cong. Rec. 8218 (1978).

II. THIS LEGISLATION WILL NOT MAKE VOLUNTARY EARLY RETIREMENT PLANS PER SE DISCRIMINATORY.

An objection is made that the legislation would invalidate "distinctions on the basis of age" in any benefit program which is not justified by equal cost. Thus, the objection goes, any voluntary early retirement plan which contains an eligibility criteria based on age will become "per se discriminatory."

This objection rests on a simple misunderstanding. The ADEA prohibits discrimination, not distinctions, on the basis of age. The EEOC interpretation incorporated in this legislation similarly applies the equal cost standard to "a plan or plan provision _which prescribes lower benefits_ for older employees on account of age." (emphasis supplied) A voluntary early retirement program was valid prior to _Betts_ and will be valid under H.R. 3200. _Henn v. National Geographic Society_, 819 F.2d 824 (7th Cir. 1987). Early retirement programs found to be involuntary, _Paolillo v. Dresser Industries, Inc._, 821 F.2d 81 (2nd Cir. 1987), or structured to discriminate against older workers, _Karlen v. City Colleges of Chicago_, 837 F.2d 314 (7th Cir.), _cert. denied_, 108 S.Ct. 2038 (1988) remain subject to challenge as before.

The objection is also raised that no early retirement benefit can be justified on the basis of equal cost because it is always more costly to provide a monthly benefit to a younger employee, who has more years to live, than to an older employee. This objection suggests a fundamental misunderstanding of the Act. An employer's decision to pay equal monthly benefits, rather than equal total benefits, does not violate the ADEA. _Dorsch v. L.B. Foster Co._, 782 F.2d 1421 (7th Cir. 1986).

III. THIS LEGISLATION DOES NOT CHANGE THE LAW GOVERNING AN OFFSET OF SEVERANCE PAY WITH EARLY RETIREMENT BENEFITS.

The practice of offsetting severance pay with early retirement benefits will remain subject to challenge with or without the legislation being considered, on the ground that severance pay does not constitute "an employee benefit plan" subject to protection under Section 4(f)(2). EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984); EEOC v. Westinghouse Electric Corp., 725 F.2d 211 (3rd Cir. 1983), cert. denied, 469 U.S. 820 1984. The Supreme Court itself has held that a one-time lump-sum payment is not an "employee benefit plan" under ERISA. Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987). Therefore, this practice will be subject to challenge even under Betts.

Offsetting an older worker's severance pay by pension benefits is, we believe, an exception to common practice. Severance pay is an expense ordinarily borne by the employer; early retirement is paid through an existing pension plan. This is because each benefit serves a different purpose. Severance pay attempts to cushion the harsh effects of a sudden period of unemployment. Early retirement provides a regular income to a person for the rest of that person's life after leaving the job market permanently. It reflects contributions earned over a lifetime of labor, a part of which the worker makes personally. Fairness requires that a worker not sacrifice the right to severance pay simply because the worker has earned a separate benefit serving a separate purpose.

IV. THE LEGISLATION DOES NOT REQUIRE UNREASONABLE CHANGES IN EMPLOYEE BENEFIT PLANS.

The suggestion is made that this legislation is unneeded because employers generally will maintain fair benefit programs without it. If this is the case, it is difficult to understand a principled objection to the underlying legislation, especially when it restores an interpretation of 20 years.

In addition, critics object that legitimate features of employee benefit plans cannot meet the equal cost standard. Special concerns about voluntary early retirement incentives are fully accommodated by the legislation. Critics otherwise fail to identify a single instance of benefit plan discrimination against older workers which (a) cannot satisfy the equal cost standard but (b) merits protection under the law. If such a situation exists it should be identified and dealt with particularly.

V. AN EFFECTIVE DATE OF JUNE 23, 1989 FOR REMEDIAL LEGISLATION WILL MAINTAIN CONTINUITY AND UNIFORMITY IN THE LAW.

The legislation under consideration would be effective June 23, 1989, the date of the Betts decision. Its effective date treats all parties and employee benefits alike, and avoids sudden and irrational gaps in the law's application.

Using this effective date will not create surprise or prejudice for parties affected by it. To the contrary, it simply reinstates settled law of twenty years' duration. As shown above, the ADEA has consistently been interpreted by agencies charged with its enforcement to permit discriminatory provisions in employee benefit plans only on the basis of an equal cost justification. The five courts of appeal to address this issue prior to the Betts decision have adopted the equal cost standard, EEOC v. City of Mt. Lebanon, 842 F.2d 1480 (3d Cir. 1988); Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir.), cert. denied, 108 S.Ct. 2038 (1988); Betts v. Hamilton County Board, 848 F.2d 692 (6th Cir. 1988), rev., 57 U.S.L.W. 4931 (June 23, 1989) or have articulated a similarly narrow standard, EEOC v. Home Insurance Co., 672 F.2d 252 (2d Cir. 1982) ("valid business reasons"); Crosland v. Charlotte Eye, Ear & Throat Hospital, 686 F.2d 208 (4th Cir. 1982) ("legitimate business purpose").

The suggestion that a mildly retroactive application of this law to the date of the Betts decision will invalidate "practices that no reasonable employer could have believed to be improper" is fanciful. No employer prior to Betts could have believed that its employee benefit plans were totally exempt from ADEA coverage. To do so would have contradicted twenty years of consistent administrative and judicial interpretation permitting discriminatory plan provisions only on the basis of a narrow cost justification.

The enactment of retroactive statutes confined to short and limited periods required by the practicalities of producing federal legislation is a "customary congressional practice" and is especially appropriate where Congress wishes to prevent employers from taking unfair advantage of the legislative process in order to frustrate the purposes of a statutory change. Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 731 (1984).

This legislation, therefore, does no more than to fill a short gap in the law's continuity for more than twenty years. It assures consistently in the law's application, and assures that all persons affected by the law will be treated alike.

OLDER WOMEN'S LEAGUE

NATIONAL OFFICE

November 10, 1989

NOV 1 7 19

The Hon. Edward Roybal
300 New Jersey Avenue, SE, Room 712
Washington, D.C. 20515

Dear Chairman Roybal:

The Older Women's League (OWL) thanks you for your leadership on H.R. 3200, legislation to remedy the effects of the Supreme Court's decision in Public Employees Retirement System of Ohio v. Betts.

We pledge our support in organizing our grassroots membership and in assisting you and your staff in anyway possible to enact this important piece of legislation.

OWL strongly believes that the Betts decision flies squarely in the face of the intent of Congress in enacting the Age Discrimination in Employment Act (ADEA). H.R. 3200 will clarify once and for all that ADEA protections are fully applicable to employee benefit plan.

Enactment of this legislation will make a significant difference in the lives of thousands of midlife and older women. June Betts' retirement income is now one-half the amount she would have received had she been eligible for the age-based disability benefit.

With more than four in ten midlife and older women living below 150 percent of the federal poverty line, passage of H.R. 3200 could provide the difference between having enough to eat and a safe roof overhead and not.

Given women's current disadvantage regarding Social Security and pension benefits, it is vitally important that the ADEA's protections be correctly applied to employee benefit plans.

Older women experience the double whammy of both sex and age discrimination on the job. H.R. 3200 moves a small, but significant, step towards greater workplace equality for these women.

Again, thank you for your leadership. We look forward to working with you and your staff for swift passage of the legislation.

Sincerely,

Lou Glasse

Lou Glasse
President

730 Eleventh Street, NW ◆ Suite 300 ◆ Washington, DC 20001 ◆ (202) 783-6686

AARP

SEP 15 1989

SEP 21 1989

September 11, 1989

The Honorable Edward Roybal
U.S. House of Representatives
Washington, DC 20515

Dear Representative Roybal:

The American Association of Retired Persons (AARP) thanks you for sponsoring the OLDER WORKERS' BENEFIT PROTECTION ACT (H.R. 3200). Your commitment to protecting the rights of older workers and to restoring the effectiveness of the Age Discrimination in Employment Act (ADEA) is greatly appreciated.

A recent decision by the U.S. Supreme Court, Public Employees Retirement System of Ohio v. Betts, opened the door to arbitrary age discrimination in employee benefits for the first time since the ADEA was passed more than 20 years ago. The Older Workers' Benefit Protection Act will make clear that the ADEA prohibits employers from arbitrarily denying or reducing employee benefits for older workers.

H.R. 3200 simply codifies pre-existing principles regarding the rights of older workers to equitable treatment in employee benefits. It is fair to both employers and employees. Employers have operated their benefit plans by these principles for many years; compliance with them is no hardship.

Passage of the Older Workers' Benefit Protection Act will send a strong message to the courts, to employers, and to the country that Congress will not tolerate age discrimination in the work force.

AARP applauds your support for these principles and looks forward to working with you for expeditious passage of this bill.

If you have any questions or would like more information, please contact Michele Pollak at 728-4729.

Very truly yours,

Horace B. Deets

Horace B. Deets

American Association of Retired Persons 1909 K Street, N.W., Washington, D.C. 20049 (202) 872-4700

Louise D. Crooks *President*   Horace B. Deets *Executive Director*

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Robert F. Laufman
Trudy D. Rauh
Alphonse A. Gerhardstein

October 3, 1989

Cathleen Johnson
Professional Staff Member
Committee on Education and Labor
1040 Longworth HOB
U.S. House of Representatives
Washington, D.C. 20515

Re: H.R.3200

Dear Ms. Johnson:

Enclosed are my responses to the questions submitted to my by Representative Marge Roukema regarding H.R. 3200.

Sincerely yours,

Robert F. Laufman

Robert F. Laufman

RFL:ma

Enclosure

H.R. 3200

Older Workers Benefit Protection Act

RESPONSE BY ROBERT F. LAUFMAN
TO QUESTIONS FROM
REPRESENTATIVE MARGE ROUKEMA

I represented June Betts throughout her litigation and argued on her behalf before the Supreme Court. I am quite familiar with the legislative history of the ADEA and its amendments but am not an expert on all types of employee benefit plans, pension plans, ERISA, and Treasury regulations. I would defer to the opinions of the Mr. Mackaronis, Ms. Clauss, and Mr. Fretz who testified on the Panel II.

Response to Questions

My responses to the questions are below.

Part I: Reach of the legislation

1. No. Not all age-based distinctions are prohibited. Pension and retirement plans are covered by Section 4(i) which permits certain distinctions. Plans that discriminate against workers under age 40 are not unlawful. Plans that treat older workers more favorably than younger workers not unlawful.

In addition to the "cost justification exception" there are other exceptions available to the employer in Section 4 such as "where differentiation is based on reasonable factors other than age."

For those employers whose employee benefit plans provide lower benefits for older workers than for younger workers they can still avoid liability by showing that the cost to the plan was the same for the older group as for the younger group of workers. In addition, EEOC regulation 1625.10 provides the employer with flexibility to qualify for the exception in other ways which do not require actual cost justification.

2. No. The employee must first prove that the benefit plan discriminates on the basis of age. The burden of proving age discrimination is always on the employee. Once the employee has met this burden, then the employer may raise any of the affirmative defenses in Section 4(f). The most likely defense to discrimination in employee benefits would be § 4(f)(2)(B). If the employer chooses to raise this defense then he has the burden of proving that he is entitled to it because the employer has ready access to the necessary information while the employee does not. It is standard legal practice to place the burden of proof on the party raising an affirmative defense.

3. No. Age-based distinctions are permitted under the ADEA as long as they do not treat older workers less favorably than younger workers. In 1986, Congress amended the ADEA to add section 4(i) and retirement and pensions plans are now covered by section 4(i).

4. A retirement plan is not subject to lawsuits by younger workers. Only those age 40 and above are protected by the ADEA. It is not unlawful to provide greater benefits to an older worker than to a younger worker. See EEOC Policy Statement on Extending Additional Benefits to Older Workers, 29 C.F.R. § 1625.2.

5. I have not seen the EEOC briefs in Abenante v. Fulflex and cannot comment on this issue.

6. An employer is not barred from asking the age of an employee for purposes of retirement benefits.

Part II. Cost Justification as an Exclusive Defense.

1. No. EEOC guidelines § 1625.10(d)(3) covers this issue. Costs are determined by comparing the costs for employees in the older group with costs for employees in the younger group. Cost comparisons and adjustments may be made on the basis of age brackets of up to 5 years.

2. No. The bill does not require individual cost data and the EEOC guidelines provide for group data.

3. No. Pension and Retirement plans are covered by § 4(i). Only those employee plans that provide lower benefits to older workers on account of age need raise the § 4(f)(2)(B) defense and meet its burden of proof.

4. The employer has a wide range of choices as to what cost data to use. Under EEOC Guideline § 1625.10(d)(1) an employer may use any of the following:

(a) cost data which shows the actual cost to it of providing the particular benefit in question over a representative period of years.

(b) cost data for its own employees over such a period.

(c) cost data for a larger group of similarly situated employees.

(d) where reliable cost information is not available, reasonable projections made from existing cost data meeting the standards will be considered acceptable.

For those employers who do not wish to use cost data, the EEOC guidelines have provided an alternative on certain benefits such as long term disability benefits. § 1625.10(f)(ii) provides that instead of reducing benefits on a cost basis, the EEOC would not assert a violation where the level of benefits is not reduced and the duration of benefits is reduced in the following manner:

(a) with respect to disabilities which occur at age 60 or less, benefits cease at age 65.

(b) with respect to disabilities which occur after age 60, benefits cease 5 years after disablement.

5. There is no question 5.

6. I have not seen the EEOC briefs in Abenante v. Fulflex and cannot comment on this issue.

7. Yes. H.R.3200 specifically references § 1625.10 which includes the 5 year age brackets.

8. Yes. H.R.3200 specifically references § 1625.10. See my discussion of this in paragraph 4.

Part III. Retroactivity

1. This question is directed to the EEOC.

2. This question is directed to the EEOC.

3. This question is directed to the EEOC.

4. H.R.3200 does no more than restore the law to where it was before the Supreme Court's decision in Betts. Since the effect intended is to reinstate the EEOC Guidelines in § 1625.10 as they were before Betts the situation you describe could not occur.

5. The purpose of H.R. 3200 is to restore the law to its pre-Betts status. Before Betts, the guidelines had been in effect for 20 years and were being obeyed by most employers. There is nothing unfair in applying H.R. 3200 retroactive as to actions or proceedings brought under the ADEA prior to June 23, 1989 which were still pending on that date.

Employers who revised their plans after June 23, 1989 (and before passage of this act), in good faith reliance on the Betts decision, would be protected by § 7(e) of the ADEA 29 U.S.C. § 626(e) which incorporates 29 U.S.C. § 259[1] of the Portal to Portal Act if they acted in reliance on any written administrative regulation, ruling, or interpretation. Reliance on a Supreme Court decision invalidating the guidelines would certainly carry the same protection as following valid guidelines.

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[1] 29 U.S.C. § 259(a) of the Portal to Portal Act, incorporated into the ADEA through § 626(e) provides that:

> In any action or proceeding based on any act or omission on or after the date of the enactment of this Act, no employer shall be subject to any liability or punishment ... if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulations, order, ruling, approval or interpretation ... or any administrative practice or enforcement policy of [the Commission].

In addition, employers are free to write the EEOC for an opinion letter as to the legality of an employee benefit plan before putting it into effect. Such a letter would constitute a valid defense to lawsuit brought under the ADEA. See 29 C.R.F. § 1626.18.

Finally, assuming retroactive legislation is passed without undue delay, the situation you describe is unlikely to occur. Employee benefit plans are not changed overnight and few if any have been changed as yet. Also, changes to employee benefit plans require planning with experts who would surely be aware of this pending legislation.

6. It is important to keep two things in mind. In 1978, Congress expressly rejected the Supreme Court's decision in United Airlines v. McMann, 434 U.S. 192 (1977) which held that seniority plans in effect prior to passage were exempt from compliance with the ADEA. The Conference Report, approved by both Houses following the McMann decision on seniority plans stated:

> "The conferees specifically disagree with the Supreme Court's holding and reasoning in that case. Plan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they antedate the act or these amendments."

H.R.Conf.Rept. No. 95-950, p.8 (1978), U.S.Code Cong. & Admin. News 1978, p.529. H.R. 3200 merely restores the law in this area to its pre-Betts status.

Second, plans that were changed in reliance of the Supreme

Court's decision in Betts would probably be exempt as explained in paragraph 5.

In addition the short 180 days statute of limitations for filing with the EEOC (300 days in deferral states) would eliminate most pre-Betts cases except those pending already pending.

As to changes in seniority plans in reliance of the Betts decision, see my comments in paragraph 5.

Part IV: Seniority Systems

1. No. It would only return the law with respect to seniority plans to where it had been prior to Betts. See my response to Part III-6.

2. See my response to Part III-6.

3. No. See my response to Part III-6.

4. That is correct.

5. See my response to Part III-6. Congress did not intend that pre-act plans be exempt.

Respectfully submitted,

Robert F Laufman

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SUPPLEMENTARY
STATEMENT OF ROBERT F. LAUFMAN
ATTORNEY AT LAW

BEFORE THE

Select Committee On Aging

Subcommittee on Labor-Management Relations

Subcommittee on Employment Opportunities.

ON
H.R.3200

October 2, 1989

Robert F. Laufman
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My name is Robert F. Laufman of the law firm of Laufman, Rauh and Gerhardstein of Cincinnati, Ohio.

On September 21, 1989, I testified at hearings on H.R. 3200 before these committees. At this time I would like to supplement my oral testimony and prepared statements to include a discussion of the legislative history of the ADEA and to expand upon my remarks regarding early retirement. I ask that this supplementary statement be made a part of the record.

Legislative History of the ADEA and Amendments.

When S.830 was first introduced in 1967 it had no employee benefit plan exception. During the Senate hearings on age discrimination, March 15-17, 1967, the U.S. Chamber of Commerce testified that if the ADEA were applied to certain employee benefit plans, it might cause employers to discriminate in hiring older employees. One concern mentioned by the Chamber involved health and life insurance plans where, it claimed, reductions in benefits for older workers were necessary "by cost and actuarial considerations."[1] During the Senate hearings, sponsors of the bill stated that if employers were required to provide identical benefits to newly hired older employees and younger employees, the higher cost of benefits to older workers could cause the Act to promote, rather than reduce, discrimination.

At the time the Senate voted on the ADEA in 1967, Senator

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[1] Age Discrimination in Employment: Hearings before the subcommittee on labor of the Senate Committee on Labor and Public Welfare on S. 830 and S. 788, 90th Cong. 1st. Sess. 105-106 (Statement of Anthony J. Obadal, U.S. Chamber of Commerce).

Javits, who introduced the 4(f)(2) exception for employee benefits plans, made the following statement by way of introducing discussion of the benefit plan provisions:

> "The amendment relating to seniority systems and employee benefit plans is particularly significant: because of it an employer will not be compelled to afford older workers exactly the same pension, retirement, or insurance benefits as younger workers and thus employers will not, because of the often extremely high cost of providing certain types of benefits to older workers, actually be discouraged from hiring older workers." (emphasis supplied)

113 Cong. Rec. 31,254-31,255 (Nov. 6, 1967).

Section 4(f)(2) was drafted in general terms specifying only that "employee benefit plans such as pension, retirement and insurance plans" were to be exempt. From this language it was apparent that some, but not all, employee benefit plans were to be exempt. Congress made no attempt to legislate in detail how § 4(f)(2) was to be applied to the numerous types of employee benefit plans which included such diverse plans as sick leave, health benefits, disability, insurance, severance pay, and prepaid legal services. Instead, Congress authorized the Department of Labor ("DOL") to issue regulations and establish reasonable exemptions. Section 9 of the ADEA (29 U.S.C.§ 628) authorized the Secretary of the DOL, in accordance with the Administrative Procedures Act, to:

> "issue such rules and regulations as he may consider necessary or appropriate for carrying out this Act, and may establish such reasonable exemptions to and from any or all provisions of this Act as he may find necessary and proper in the public interest." (emphasis added)

It was intended that the DOL would use its expertise to interpret and apply § 4(f)(2) exceptions to the multitude of employee benefit plans in existence at the time.

The first DOL interpretations, 29 C.F.R. § 860.120, were issued nearly contemporaneously with passage of the ADEA. [34 F.R. 9709, June 21, 1969]. The Interpretations stated that a plan would be in compliance where either the actual payment made or the cost incurred was the same as for a younger worker (equal benefits or equal cost). This regulation met the concern of Congress by removing the monetary incentive to discriminate from the hiring of older workers. At the same time, the regulations met the purpose of the ADEA "to prohibit arbitrary age discrimination in employment" and "to help employers and workers find ways of meeting problems arising from the impact of age on employment." Section 2(b), 29 U.S.C. § 621(b).

Amendments to the ADEA

In 1976 and 1977, Congress held hearings on the ADEA to eliminate mandatory retirement, raise the age cap on private employment to 70, and eliminate the age cap entirely for most federal employees. On October 12, 1977, Senator Williams, of the Senate Committee on Human Resources, submitted the committee report to accompany H.R. 5383. The report recognized that raising the upper age cap from 65 to 70 and eliminating mandatory retirement might have an adverse effect on the cost of employee benefit plans:

> Concerns were expressed regarding potential increased costs for employee welfare benefit plans such as disability, health, life and other forms of insurance for employees. Presently some employers reduce coverage for older workers under these plans or increase the required employee contribution as workers advance in age. This bill would not alter existing law with respect to these practices. Existing principles

> of law, including the § 4(f)(2) bona fide employee benefit plan exemption, as modified by these amendments, would be the standard by which these practices will be evaluated. (emphasis added)

S.Rep.No. 95-493, 95th Cong. 1st Sess. 5 (1977), U.S.Code Cong. & Admin. News 508. Congress clearly recognized that employers were adhering to the cost-based principles of the DOL regulations.

Senator Williams, in reporting to the Senate, reiterated the committee's intention that DOL continue to use its rulemaking powers to interpret and implement the § 4(f)(2) exceptions. 123 Cong. Rec. 34295 (Oct. 19, 1977). Senator Williams, in introducing H.R. 5383, stated the present intent of the 1978 amendments to § 4(f)(2):

> "The purpose of this exception is to facilitate the hiring of older workers by permitting their employment without necessarily requiring an employer to provide equal benefits to them under retirement, insurance or disability benefit plans. Of course, there must be some reason _other than age which justifies the unequal benefits_." (emphasis added)

123 Cong. Rec. 34295 (Oct. 19, 1977). Senator Williams added that "Section 4(f)(2) was intended to permit and _will continue_ to permit varying coverage of workers in different age groups to reflect those differences so long as they are based on valid assumptions and applied in a nondiscriminatory manner." (emphasis added) _Ibid_., at 34295.

Just prior to passage of the 1978 Amendments, Congressman Waxman spoke on the need for employers to have actuarial data to support different benefit levels. Congressman Waxman said

> **I am hopeful, however, that employers do not terminate capable and healthy older workers from benefit plans solely on the basis of age. In the absence of actuarial data which clearly demonstrates that the costs of this service are uniquely burdensome to the employer, such a policy constitutes discrimination and a conscious effort to evade the purposes of the act.**
>
> **While the conference committee did not specifically address the status of health benefits to older workers protected under this act, it is the intent of this Congress to prevent both open and subtle forms of age discrimination. Exceptions should only be applied in the strictest sense and only with full justification and cause. (emphasis added)**

124 Cong. Rec. 7888 (Mar. 21, 1978).

Congressman Pepper, chairman of the House Select Committee on Aging and one of the principal authors of H.R. 5383, urged his colleagues to approve the conference report, stating:

> The exception under section 4(f)(2) of the act is just that--an exception--and as such must be viewed in the narrowest sense.
>
> * * *
>
> For example, employers may offer health and life insurance benefits to older workers that are different from those of other employees. The original reason for this exception was to promote the hiring of older persons. Passage of this act should not be construed by any employer, or any court, to permit the sudden, total and unilateral termination of a capable and healthy worker from a health, insurance or other welfare benefit plan solely on the basis of age and without full economic justification. (emphasis added)

124 Cong. Rec. 7886 (Mar. 21, 1978).

Senator Javits responded to employers' concerns that the 1978 amendments, which prohibited involuntary retirement and raised the upper age from 65 to 70, might increase costs for employee welfare benefit plans, such as life, health, and disability programs. He noted that "some plans currently reduce coverage for older workers" and emphasized that:

> [T]hese amendments do not change present law regarding these practices.
>
> * * *
>
> The purpose of section 4(f)(2) is to take account of the increased cost of providing certain benefits to older workers as compared to younger workers.
>
> Welfare benefit levels for older workers may be reduced only to the extent necessary to achieve approximate equivalency in contributions for older and younger workers.

124 Cong. Rec. 8218, (March 23, 1978) He added that the DOL intended to "promulgate comprehensive regulations in order to provide guidance in this regard for sponsors of employee benefit plans." 124 Cong. Rec. 8219. The DOL/EEOC regulations that have guided employers covered by the ADEA have always required cost based justifications in order to reduce benefits as a worker grows older.

On December 12, 1977, while the Conference Committee was attempting to resolve differences in H.R. 5383, the Supreme Court decided United Airlines v. McMann, 434 U.S.192 (1977) which held that a retirement plan which was in effect before the passage of the ADEA in 1967 could not constitute a subterfuge to evade the Act and was exempt from the Act.

The Conference Committee, in its report to both houses, disagreed with the Supreme Court's reasoning in McMann. The Conference Report stated that the amendments were intended to overturn McMann:

> "In McMann v. United Airlines, 98 S.Ct. 244 (1977), the Supreme Court held to the contrary, reversing a decision reached by the Fourth Circuit Court of Appeals, 542 F.2d 217 ((1976). The conferees specifically disagree with the Supreme Court's holding and reasoning in that case. Plan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they antedate the act or these amendments." (emphasis supplied)

H.R.Conf.Rept. No. 95-950, p. 8 (1978), U.S.Code Cong. & Admin. News p.529.

In approving the Conference Committee Report, both Houses made it clear that pre-existing plans were not to be exempt solely because they predated either the ADEA or the 1978 Amendments.

On the day the House agreed to the conference report, Congressman Hawkins, one of the House Managers, reported to the House:

> "The conferees specifically disagree with the Supreme Court's holding and reasoning in that case [McMann], particularly its conclusion that an employee benefit plan which discriminates on the basis of age is protected by section 4(f)(2) because it predates the enactment of the ADEA." (emphasis added)

124 Cong. Rec. 7881 (Mar. 21, 1978).

The Senate also expressed its disapproval of the Supreme Court's decision in McMann. Remarks of Senator Javits, 124 Cong. Rec. 8218 (Mar. 23, 1978) ("As stated in the conference report, the 'conferees specifically disagree with the Supreme Court's holding and reasoning in that case.'") Following debate, the Senate agreed to the conference report on March 23, 1978, and the President signed the bill on April 6, 1978.

Following the 1978 Amendment, the DOL issued comprehensive regulations applying the equal benefit-equal cost principles. In 1979, these regulations were adopted by the EEOC and are now found at 29 C.F.R. § 1625.10. The ADEA was amended three more times, in 1982, 1984, 1986 and although the Congress was aware of the EEOC guidelines it left unchanged the EEOC guidelines on employee benefit plans.

On June 23, 1989, in Public Employees Retirement System of Ohio v. Betts, the Supreme Court rejected DOL/EEOC regulations which had been in effect for 20 years and in which most employers had been in compliance.

Early Retirement

The EEOC has indicated that it favors an amendment that would permit early retirement. I believe such an amendment is unnecessary and unwise.

As I stated in my testimony, there is nothing wrong with early retirement as long as it is truly voluntary and is not discriminatory. Employees who wish to take advantage of an employer's offer to retire at an earlier age should be free to do so. However, an older worker should not be treated less favorably because of his age.

There are many early retirement incentive plans that do not discriminate on the basis of age. Examples are lump sum incentives, incentives based on years of service, and incentives based on annual salary.

There are other early retirement incentive plans which are discriminatory and are designed to coerce employees into involuntary retirement. Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir. 1988) is such an example.

In 1980, when City Colleges had a mandatory retirement age of 65, the Illinois legislature raised the mandatory retirement age to 70. City Colleges then drafted an early retirement program "to realize financial savings by replacing older faculty members earning a higher salary with younger faculty members."

The plan was open to faculty members between 55 and 69 and had two discriminatory provisions:

> Group Insurance Policy. Faculty members who retire between the ages of 55 and 64 continue to be covered by the Colleges' group insurance policy (which includes life, health, dental, vision, homeowner's, and automobile insurance) until they reach the age of 70. Those who retire after age 65 cease to be covered upon retirement.
>
> Accumulated sick pay. In addition to their early retirement pension, faculty members could receive a lump sum equal to a percentage of accumulate sick leave, valued at his base salary. The percentage of accumulated sick leave paid as a lump sum was based on age at retirement as follows:

Age at Retirement	Percentage credited
55-58	50%
59	60%
60-64	80%
65-70	45%

This so-called early retirement plan was clearly intended to replace the mandatory age 65 retirement policy which had become unlawful. The Seventh Circuit held the plan's sharp reduction in benefits at age 65 was discriminatory on the basis of age and could not meet the equal cost, equal benefit test.

H.R. should not be amended to permit early retirement plans but the courts should be permitted to resolve early retirement plans on a case by case basis.

Respectfully submitted,

Robert F. Laufman

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MARTINSVILLE, VA 24112

International Brotherhood of Du Pont Workers

I.B.D.W.

OCT 3 1989

September 27, 1989

The Honorable Edward Roybal
Chairman, Select Committee on Aging
U.S. House of Representatives
Washington, D.C. 20515

The Honorable William Clay
Chairman, Subcommittee on Labor-Management Relations
Committee on Education and Labor
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Matthew Martinez
Chairman, Subcommittee on Employment Opportunities
Committee on Education and Labor
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Roybal, Clay and Martinez

This letter is being submitted by the International Brotherhood of DuPont Workers (I.B.D.W.) in connection with the joint hearing conducted on September 21, 1989 by the Select Committee on Aging and the Subcommittees on Labor-Management Relations and Employment Opportunities of the committee on Education and Labor on the subject of "Employee Benefit Plans: The Impact on the Betts Decision". We ask that this letter be made part of the hearing record.

The I.B.D.W. represents approximately 10,000 employees participating in nine locals throughout the country.

The I.B.D.W. believes that the decision of the Supreme Court in Public Employees Retirement System of Ohio v. Betts, 109 S. Ct. 2854 (1989) improperly limited the applicability of the Age Discrimination in Employment Act ("ADEA") to employee benefit plans. Regulations in effect since 1969 properly interpreted the ADEA to permit age-based reductions in employee benefits only where justified by age-related costs. This regulation was consistent with the ADEA's legislative history in both 1967 and 1978.

Unless corrective legislation is passed promptly, employers may be tempted to target older workers for benefit reductions based solely on their age. Unions may now be forced to make valuable concessions to receive benefits for older workers that the ADEA previously required.

In addition, the Betts decision endangers meritorious litigation which more than 200 Dupont employees and retirees have pursued under the ADEA in challenging an age discriminatory early retirement incentive program which DuPont provided in 1985. These employees and retirees were unlawfully denied benefits under that program based on their age. In this regard, while DuPont voluntarily increased the pensions of many younger employees by 100-150%, many of DuPont's oldest and most senior employees received no benefits whatsoever from the program.

We support the retroactivity provisions in the H.R. 3200 as these provisions ensure that victims of practices such as those engaged in by DuPont can continue to pursue those claims. For all these reasons, the I.B.D.W. supports the prompt passage of H.R. 3200 (S. 1511).

Should you have any questions or concerns regarding this matter, please feel free to contact me at the following address and phone number:

Two Bala Plaza, Suite 300
Bala Cynwyd, PA 19004

215-668-1140

Sincerely,

Kenneth Henley
General Counsel

cc: H. Dean Goad, President
International Brotherhood of DuPont Workers

KH:ams

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA—UAW

OWEN F. BIEBER, PRESIDENT BILL CASSTEVENS, SECRETARY-TREASURER

VICE PRESIDENTS

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SEP 26 1989

September 21, 1989

The Honorable Edward Roybal
Chairman, Select Committee on Aging
U. S. House of Representatives
Washington, D. C. 20515

The Honorable William Clay
Chairman, Subcommittee on Labor-Management Relations
Committee on Education and Labor
U. S. House of Representatives
Washington, D. C. 20515

The Honorable Matthew Martinez
Chairman, Subcommittee on Employment Opportunities
Committee on Education and Labor
U. S. House of Representatives
Washington, D. C. 20515

Dear Chairmen Roybal, Clay and Martinez:

This letter is being submitted by the UAW in connection with the joint hearing being conducted on September 21, 1989 by the Select Committee on Aging and the Subcommittees on Labor-Management Relations and Employment Opportunities of the Committee on Education and Labor on the subject of "Employee Benefit Plans: The Impact Of The Betts Decision". We ask that this letter be made part of the hearing record.

The UAW believes that the Supreme Court's recent decision in Public Employees Retirement System of Ohio v. Betts goes much too far and should be overturned. In effect, this decision would immunize virtually all employee benefit plans from age discrimination challenges. We do not believe that this was the intent of Congress when it enacted the Age Discrimination In Employment Act.

Although the UAW sympathizes with the intent behind the proposed "Older Workers Benefit Protection Act" (H.R. 3200), which has been introduced to overturn the Betts decision, unfortunately we cannot support this legislation in its present form. The UAW urges the sponsors to consider a number of modifications to the bill.

First, some persons have raised questions as to whether H.R. 3200 would make unlawful all types of subsidized early retirement programs. The UAW has negotiated subsidized early retirement programs throughout the automobile, aerospace, and agricultural implement industries. Many other unions have negotiated similar programs in other industries. These programs have enabled thousands of workers to enjoy a decent standard of living during their retirement years. In addition, in industries which are experiencing a contraction in their workforce, subsidized early retirement programs provide an alternative to mass layoffs of younger workers. We do not believe that the sponsors of H.R. 3200 intend to make unlawful subsidized early retirement programs. The UAW therefore urges that language be added to the legislation making it clear that these programs are perfectly lawful under the ADEA.

Second, we are also concerned that H.R. 3200 would prohibit the integration of employee benefit plans, such as severance or supplemental unemployment benefit plans and pension plans. The UAW has negotiated integrated benefit programs with many companies. We believe that this type of approach represents the best method of assuring the continuation of income and health care throughout the lifetime of workers and their families. If these integrated benefit programs are made unlawful, this will simply permit a small group of workers to "double dip" at the expense of all workers and retirees. Accordingly, we believe that H.R. 3200 should be amended to expressly permit integrated benefit programs.

Third, the UAW is concerned about the question of retroactivity under H.R. 3200. Although we believe that Betts was incorrectly decided and should be overturned, the fact is that the law relating to age discrimination in employee benefit plans was unsettled in a number of areas prior to that decision. Thus, we believe it would not be appropriate to permit individuals to bring lawsuits in these areas based on claims which arose prior to the Betts decision or the enactment of any legislation designed to overturn the Betts decision.

In conclusion, the UAW commends you, Mr. Chairmen, for holding hearings on the issues raised by the Betts decision. We look forward to working with you and the other Members of your Committees in crafting legislation which will remedy the problems created by the Betts decision, without disrupting socially desirable practices under employee benefit plans.

Your consideration of our views on this important issue will be appreciated. Thank you.

Sincerely,

Dick Warden

Dick Warden
Legislative Director

DW:njk
opeiu494

BELLSOUTH

Roy B. Howard
Vice President-Industrial
Relations and Benefits

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October 4, 1989

Ms. Diana N. Jones
Staff Assistant
Select Committee on Aging
712 House Office Building
Annex I
Washington, D.C. 20515

Re: BellSouth Statement for the H.R. 3200 Hearing Record
September 21, 1989

Dear Ms. Jones:

On behalf of BellSouth Corporation I appreciate the opportunity to comment on the impact of H.R. 3200 on employers throughout the United States which offer benefit packages to their employees and, more importantly, on the employees themselves.

BellSouth Corporation employs approximately 100,000 people, 64,000 of whom are in bargaining units represented by the Communications Workers of America with which BellSouth bargains over issues such as employee benefit plans. While our primary business is providing telecommunications services to over 15 million customers in North Carolina, South Carolina, Georgia, Florida, Alabama, Tennessee, Kentucky, Louisiana, and Mississippi, the various BellSouth Companies offer products and services in 47 states and 8 countries throughout the world. Among our subsidiaries are Southern Bell, South Central Bell, BellSouth Services, and BellSouth Enterprises. Upon reviewing the testimony presented by the parties at the September 21st hearing before this Committee and the language in H.R. 3200, it is apparent that passage of this legislation would invalidate virtually hundreds of currently accepted benefit arrangements and practices in effect in this country. Many of these plans are the products of the collective bargaining process. The legislation could, as currently drafted, adversely affect the interests of those employees whom ADEA is designed to protect by causing employers to eliminate or reduce the levels of benefit plans such as early retirement subsidies, voluntary early retirement programs, and other programs which benefit older employees. Moreover, this legislation would discourage companies which do not offer a broad range of benefit plans from doing so.

An employer strives to design a benefit package which accommodates the needs of its particular employee body. All employers have limited resources available for such a package. Therefore, an attempt is made to coordinate and integrate benefit plans so that funds are allocated in a manner which serves the needs of all parties involved. Coordination allows a company to spread benefit coverage equitably throughout the organization to meet its goals of attracting and retaining qualified employees. A well-designed package takes into consideration those benefits which employees would receive based on age, years of experience, and other factors. A package is thus developed that would provide benefits to the largest number of employees possible and distribute the benefit dollars equitably throughout the organization. Coordination of benefits such as pension/severance pay offsets insure that some employees do not receive the windfall of duplicate coverage while others receive a lesser amount. Because this legislation requires that, in order to use age based criteria, benefit payments for each older employee be greater than that paid to any younger employee, the amount of dollars could not be spread equitably among employees in different categories. If it was even possible to calculate the cost to an employer of an individual's benefit, such a requirement would encourage employers to take steps that would adversely effect an employee. For example, most pension plans pay a higher pension to a 65 year old employee than to a 50 year old employee with the same amount of service. Because age is the only criteria for differentiation in that case, the legislation would require that the 50 and 65 year old employees receive the same pension if they have the same service. An employer would then be forced to either set the retirement criteria on service alone or alter the type of pension benefits offered. This result is certainly not consistent with the intent of the ADEA and would legislate against practices which are currently lawful under ERISA and the Internal Revenue Code. One of the greatest crises in the country today is the problem of rising health care costs and the cost to employers of providing benefit coverage. H.R. 3200 will have one of two effects. It will either deepen the crisis by invalidating most benefit plans currently in existence, thereby requiring the designing of more expensive plans, or it will result in a drastic reduction over time in the level and variety of benefits offered to employees.

A perfect example of how this legislation would harm employees is in the area of voluntary early retirement programs. These programs have been successfully used by many employers, including BellSouth. Normally existing pension benefits are enhanced for employees who may want to leave the payroll before attaining eligibility for a non-discounted pension or a supplement is paid to those eligible for a full pension. These programs accommodate employees who are either ready to retire or start a new career. The prohibition in H.R. 3200 against any age based distinction unless "for each benefit or benefit package...the actual amount of payment made on behalf of the older worker" is "no less than that made on behalf of a younger worker" will ring the death knell for such programs. In an effort to allow eligible employees the opportunity to leave the payroll voluntarily, companies provide incentives such as lump-sum payments based on years of service, present value of current pension discount, or other criteria necessary to attract acceptance by the desired group. If a company had to pay actuarially equivalent amounts to all retirement eligible employees, the amount to be paid from the available funds would be insufficient to encourage younger retirement eligible employees to retire or the amount which would have to be paid by the company would be so excessive that the company could not afford to offer the program. Therefore, employers would merely bypass voluntary plans and be forced to resort to involuntary layoffs.

Another example of the negative impact of this legislation would be the elimination of an employer's right to implement pension/severance offset plans or severance plans which take into consideration the fact that some employees are eligible for a full pension and some are not. It is certainly equitable to allow an employer to calculate severance pay by taking into consideration the fact that one individual is eligible for a full pension and one is eligible only for a discounted pension. Severance pay is intended to provide transition payments for an employee going from one job to another. The employee ineligible for full pension receives a smaller pension upon leaving the company and will need a larger severance payment. This legislation would place an employer in a position of deciding to either pay the larger amount to both employees, which may result in the eventual elimination of the severance plan, or reducing the severance amount over time. In either case employees will suffer. Severance plans help mostly older employees ineligible for full retirement. If the same amount of severance dollars had to be offered to all retirement eligible employees, the amount would definitely go down.

BellSouth has a history of an excellent bargaining relationship with CWA. We have successfully bargained a total benefit package which meets the needs of our employees. Our benefit plans are coordinated and integrated so that funds are allocated in a manner serving the needs of both the company and its employees. Legislative interference in this process would not only impede the bargaining process, but would harm those whom it was intended to serve. I must point out that basic design of virtually all retirement plans utilizes age based distinctions. A typical plan establishes normal retirement age at which a worker becomes eligible to retire and receive full benefits from the plans. Most plans offer an early retirement option which would allow an employee to retire with a predetermined discount from the full pension. The discount is based upon a schedule or actuarial table according to the amount of time remaining until that employee would have reached normal retirement age. Some plans establish certain levels of benefits with the understanding that employees whose ages qualify them for Social Security benefits would receive that government benefit which, when combined with the pension benefit, will provide a fair and appropriate retirement income. This is known as "Social Security Integration". The proposed legislation would make these types of age based distinctions unlawful and would expand the ADEA's definition of compensation to cover all employee benefits including retirement benefits. By prohibiting age distinctions in benefit planning the use of any age based factors would be eliminated even though age is the major eligibility component of a vast number of retirement plans.

Calculating "equal cost-equal benefit" would be a gigantic, costly task for all employers, but particularly for small employers. Retirement plans utilize legitimate age distinctions, yet are seldom susceptible to precise cost analysis. A company may maintain a pension plan offering employees a set percentage of their final salary for each year of service when they retire at age 65. However, the plan is usually funded through employer contributions and the investment gains of the pension fund. The amount which the company must contribute each year is determined by the plan's actuaries. In order to accurately predict a defined benefit plan's funding needs, the actuary must predict with some degree of assurance the age at which employees can be expected to retire and the benefits to which they will be entitled. Therefore, the non-discount age and Social Security benefits determine when the employees are economically eligible to retire. Because such plans are funded on actuarial predictions of the future rather than the cost of providing the benefit to one individual, the employer would not be able to show the cost of providing a benefit to any one employee. Therefore, the cost justification defense will be virtually impossible to raise. Accordingly, the company must abandon its early retirement option, increase its contributions, or require employees to contribute to offset the increased demand on its basic pension fund. A substantial portion of each fund's income depends on the performance of various investment vehicles. It would be virtually impossible to identify that portion of the fund and its earnings directly traceable to employer contributions on behalf of a particular individual. Because the cost justification defense would be almost impossible to raise, the practical effect of this legislation would be the elimination of threshold ages for retirement eligibility, a requirement that younger protected employees receive the same benefits as older protected employees, and employer's inability to impose an early retirement discount on those retiring before normal retirement age. These results would be totally contrary to all traditional principles of benefit plan design. Moreover, if the legislation is made retroactive this could result in a 42 year old employee who meets the minimum vesting requirements for pension eligibility claiming that only his age prevents him from retiring with full benefits. He would contend that he should be entitled to retire with full benefits. The fund was designed to pay him a benefit beginning many years in the future and the impact on pension funds of companies throughout the country could be catastrophic.

Any cost analysis requirement should allow cost analysis in aggregate for the entire package of benefits. An employer should be protected from younger employees' claims that their benefits are illegal because of age distinction. To manage for the long term, we must have normal retirement age criteria from which we can discount for early retirement.

We feel that the Betts case addressed a very special set of circumstances of someone who was unfortunate to be the subject of a terrible disease. I must point out that under the current BellSouth benefit rules, Ms. Betts would have qualified for a deferred vested pension. She would have been eligible for 52 weeks of sickness benefits after which she would have qualified for long-term disability until eligible for a deferred vested pension at age 65. So while BellSouth would never be subjected to similar conditions, the proposed legislation would cause severe changes in our plans and would have a negative impact on our company and its employees. Also, the benefit needed for Ms. Betts is Long Term Care rather than increased pension. In fact, an increased pension may have prohibited her from being eligible for medicaid benefits.

BellSouth is firmly committed to complying with the spirit of all equal employment statutes including the Age Discrimination in Employment Act. Older workers are valuable assets and we firmly believe in protecting these workers. However, this legislation would not achieve this purpose. BellSouth urges the Committee to carefully study the issues presented by this legislation to assure that it represents sound employee benefit policy. We will also be glad to work with the members in your efforts to protect older workers.

Very truly yours,

Roy B. Howard

Roy B. Howard

RBH/bkt

American Iron and Steel Institute
1133 15TH STREET, N.W., WASHINGTON, D.C. 20005-2701

Peter A. Hernandez
Vice President
Employee Relations
(202) 452-7212

October 5, 1989

The Honorable Matthew G. Martinez
Chairman, Subcommittee on Employment Opportunities
Committee on Education and Labor
U.S. House of Representatives
Washington, D.C. 20515

RE: Statement on Behalf of American Iron and Steel Institute on Age Discrimination in Employee Benefit Plans: The Impact of the Betts Decision and H.R. 3200

Dear Mr. Martinez:

American Iron and Steel Institute (AISI) is a not-for-profit trade association with forty three domestic member companies. AISI's members account for approximately 80% of raw steel production in the United States and employ a total of 170,000 people in steel-related operations. We respectfully submit the attached statement describing our concerns with and objections to H.R. 3200, "The Older Workers Benefit Protection Act of 1989".

Briefly, we believe that H.R. 3200 i) improperly characterizes the U.S. Supreme Court decision in Public Employees Retirement System of Ohio v. Betts; ii) fails to recognize the significant adverse impact that the bill would have on existing integrated employee benefit plans offered by the domestic steel industry; iii) makes no provision for resolving the conflict created by this bill with a long history of carefully considered case law that has developed pursuant to the Employee Retirement Income Security Act of 1974, as amended (ERISA); iv) would unfairly penalize employers that have had these benefit plans in effect for many years through its retroactive application; and v) ultimately, disadvantage older workers who have long-service employment.

Existing steel industry integrated benefit plans favor older workers with long service employment. However, H.R. 3200 fails to recognize this service component and thereby would create serious and costly problems for steel company integrated benefit plans. This bill would also force employers into a counter productive posture with its employees. At a time when the steel industry is struggling to modernize to meet fierce international steel competition, it can ill afford to be burdened by employment cost increases that hinder rather than help this restructuring effort.

We urge the Committee to consider the pitfalls associated with H.R. 3200 and not to seek a hasty legislative solution that would ultimately adversely affect more older workers than it would benefit.

If you have any questions regarding these comments, we would be pleased to meet with you or your staff.

Sincerely,

Peter A. Hernandez

PAH:mlt

Attach.

STATEMENT FOR THE RECORD SUBMITTED ON BEHALF OF

THE AMERICAN IRON AND STEEL INSTITUTE

TO THE

SELECT COMMITTEE ON AGING

THE EDUCATION AND LABOR SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES

THE EDUCATION AND LABOR SUBCOMMITTEE ON LABOR-MANAGEMENT RELATIONS

OF THE U.S. HOUSE OF REPRESENTATIVES

ON

"AGE DISCRIMINATION IN EMPLOYEE BENEFIT PLANS:

THE IMPACT OF THE BETTS DECISION"

IN RESPECT OF HEARINGS HELD ON

THURSDAY, SEPTEMBER 21, 1989

WASHINGTON, D.C.

American Iron and Steel Institute

This statement is submitted for the record on behalf of the American Iron and Steel Institute with respect to the Hearing held on September 21, 1989.

The American Iron and Steel Institute ("AISI") is a not-for-profit trade association with forty-three (43) domestic member companies. AISI's members account for approximately 80% of raw steel production in the United States, and employ a total of approximately 170,000 people in steel-related operations.

Presently pending before the House Education and Labor Committee is H.R. 3200, which its proponents contend will overturn the decision of the United States Supreme Court in Public Employees Retirement System of Ohio v. Betts and restore the law to its pre-Betts state. Not only do these proponents improperly characterize the state of the law prior to the Betts decision, they also ignore the significant adverse impact which H.R. 3200 would have on existing employee benefit programs and make no provision for the conflict between provisions of the bill and the regulations and case law developed pursuant to the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

H.R. 3200 Shifts Normal Burdens of Proof In Discrimination Cases.

The Age Discrimination in Employment Act of 1969 ("ADEA") is an anti-discrimination statute, prohibiting unfavorable treatment of employees on the basis of their age. As other witnesses testified during the hearing, at the time of its enactment, Congress made a specific determination to focus on providing employment opportunities for older workers and to leave the complex issue of benefit treatment to future legislation, focusing instead on prohibiting unfavorable employment actions, such as failure to hire, promote, etc., based on age.

Since the enactment of the Civil Rights Act of 1964, the key in determining liability under the various discrimination laws has been the underlying motivation or intent for the action complained of. Case law developed in the past 25 years has made it clear that the burden of proof in demonstrating that intent, or improper motivation, lies with the person alleging improper conduct. Discriminatory intent is presumed only when the employer is unable to offer a non-discriminatory reason or rational business purpose to explain the action taken. The pending Bill would essentially overturn these firmly-rooted principles, presuming discriminatory intent from any age-related benefit criteria and establishing a cost-justification test as the only legitimate basis for such an action.

How Benefit Integration Works

This shift in a basic tenet of discrimination law is especially troublesome given the nature of employee benefit packages generally. An employer's fringe benefit program is composed of multiple parts which, taken together, make up the package of benefits, over and above wages, which it offers to its employees. The differing parts of that program are frequently designed to meet special perceived needs of limited groups of employees, in order to permit the maximum number of employees to achieve the highest over-all level of benefits at a reasonable cost.

This approach, which underlies today's accepted principles for benefit program design, recognizes the wide range of employee demographics existing in the workforce of any major employer and the resulting differences in the needs and desires of the varying parts of that force.

Most benefit programs had their inception decades ago with relatively simple components. Over the years, additional pieces have been added to the framework, many designed solely to meet particularized needs which were not adequately addressed by other portions of the package. Because of this fact, the various pieces have a different impact on different groups of employees. However, the true determiner of the benefits furnished to any group of employees, whether older or younger, is the total benefit package which they receive over and above their salary or wage.

Fringe benefit packages are intended to provided for an employee and his or her family in times of adversity. One of their principal functions is to provide resources for income replacement or the payment of medical or other expenses, particularly during a time when normal wages are not available or are insufficient to meet these needs. In determining necessary levels of such benefits, an employer normally takes into account monies available from other sources, particularly those which the employer, itself, is providing. Examples of such funds would be salary continuance programs, workers compensation and long term disability programs, insured sickness and accident benefits, Social Security Disability payments, Medicare, Social Security Old Age and Survivors benefits, to name but a few.

This practice of interrelating the various elements of an employee fringe benefit package is frequently referred to as "integration" and simply exemplifies a design concept which seeks to cure a particular problem while taking into account other resources available to the employee group from other portions of the package. It is utilized in the benefit packages afforded by the members of AISI and by most other employers.

An example of such integration can be found in the interaction of the Steel Industry's supplemental unemployment benefit plans ("SUB") with its pension plans.

Under the pension plans, an employee can usually continue to accrue age and service for a period of two years after termination of active employment. Under the SUB plans, an employee can accumulate up to 52 weeks of supplemental unemployment benefits to be utilized during a period of layoff. An employee who is affected by a force reduction, who, at the time of his or her layoff, lacks sufficient age and service to be eligible for a pension may, during the following two year period, acquire sufficient additional age and service to become pension eligible. However, this places the employee in a situation where he or she is eligible for SUB only for the first year of layoff, but must remain on layoff for a second year in order to become eligible for the pension; thus, risking a year of layoff with no income in order to achieve pension eligibility.

In order to deal with this situation, the SUB plans were amended to provide that those employees in this situation, and only those employees, would be eligible for additional benefits until they became pension eligible, or for up to an additional 52 weeks. This piece of the program was never intended to guarantee SUB to all employees for a two year period. It was intended solely to bridge an existing gap in the over-all program.

Similarly, many force reduction pensions provide for a supplementary payment, in addition to the normal pension amount, until the employee becomes eligible for Social Security benefits. Referred to as "Social Security bridge payments," and specifically recognized and approved under ERISA, these payments are designed to assist the employee, by means of an increased income stream, until the point in time that Social Security income becomes available.

Integration is not limited to a force reduction or shutdown context, but is the keystone upon which virtually all existing employee benefit packages are built. By prohibiting an integrated approach to the provision of fringe benefits, the proposed legislation would invalidate all such provisions, require most employers to redesign their entire fringe benefit package and effectively foreclose an employer's ability to provide a benefit package which addresses the needs of small groups of employees.

Existing Benefit Packages Favor Older Workers

An examination of existing employee benefit programs and the case law which has developed under ERISA, the statute under which they are controlled and monitored by both the Department of Labor and the Internal Revenue Service, makes clear that integration does not serve a nefarious purpose. To the contrary, fringe benefit packages, taken as a whole, favor longer-service employees. Additionally, integration itself, and many of the specific practices involved therein, have been specifically examined and approved under ERISA.

Indeed, the piecemeal approach to fringe benefit examination proposed by the Bill and the requirement of a cost-justification based on incremental age not only ignore the favored treatment that older workers receive under such programs, but fail to acknowledge the impact that length of service has on benefit eligibility.

This impact can be seen by looking at the benefits available to persons with various age and service combinations under a normal steel industry shutdown program. For instance, an employee 59 years of age with 10 years of service would be eligible to receive severance allowance and a deferred vested pension payable at age 65; while an employee 59 years of age with 15 years of service would receive an immediate regular pension, plus a monthly supplement, plus a special payment equal to 13 weeks of salary, plus retiree life and health insurance and a death benefit payable for the life of his or her spouse equivalent to 1/2 of his or her pension.

As can readily be seen, the factor which changes the level of benefits for which these employees are eligible is not their age, but their length of service.

Contrary to the position taken by the EEOC, even the integration of severance allowance and pension plans in the event of a shutdown does not adversely effect older workers.

This can readily be demonstrated by a review of the recent experience of a major steel company. As you are aware, the steel industry, like many other industries, has been engaged in over-all force reductions over the last several years. One such company conducted a study, covering a three year period of heavy force reductions, looking specifically at the impact of shutdown benefits on older employees. During this period of time, more than 15,000 employees were permanently laid off.

During the period studied, an employee who had more than ten years of service was eligible for a deferred vested pension payable at age 65, which could be taken on an actuarially reduced basis at any time after age 60. Additionally, an employee who had 30 years or more of service was entitled to an immediate, regular pension.

However, an employee who was affected by a shutdown, or who was laid off for a period in excess of two years (the period of time after which he or she ceased accruing service under the pension plan), could become entitled to a pension with only 15 years of service, as a result of being affected by that shutdown, provided the employee's combination of age and service reached certain totals. (In this regard, for the person age 55 or older that total needed to be only 70, while in a case of an employee under 55 the total was 80 -- clearly favoring older employees.)

In connection with the study, the company determined what each employee who was pension-eligible, or could become so during a two year period following termination, would have been entitled to receive had he or she been terminated on the date of the layoff; that is, the value of each affected person's vested pension benefits. Added to this was the severance allowance to which they would have been entitled had they not been pension eligible and the resulting figure was considered to be "available shutdown benefits." Then the pension benefits which they actually received as a consequence of having been affected by a shutdown were determined.

Not surprisingly, the benefits received by pension-eligible employees exceeded their calculated "available shutdown benefits," by more than $250,000,000. This represents an average additional payment of over $55,000 per person to those who were pension-eligible; that is, to the older employees affected.

Impact on Pension Funding

Not only does benefit plan integration not adversely impact older workers, in considering its elimination, these Committees must also carefully consider the resulting impact on benefit funding, particularly in the pension plan area. Pension funding is based on actuarial assumptions concerning the amounts which are and will become payable to employees under the existing provisions of the plan. To the extent that this legislation would preclude the integration of pension plans with other sources of available income, such as Social Security offsets, and prohibit the termination of Social Security bridge payment at age 62, it will substantially increase the cost of benefits to borne by pension trust funds, thus increasing the unfunded liability under such plans.

Similar cost increases will be seen in welfare plans to the extent that they can no longer be integrated with pension plans and other funding sources, such as Medicare and Social Security Disability payments.

The resultant "double dipping" may benefit a few, but at a cost of reduced benefit levels to all.

Impact on Collective Bargaining

Most of today's employee benefit programs had their genesis in the collective bargaining process. Labor unions, speaking on behalf of their member employees, negotiate with employers for those benefits most needed and desired by their membership. Trade-offs between wages and benefits and among various types of benefits, prioritization of the needs and desires of employees and determinations as to the limits of what can reasonably be provided are among the normal functions of these union representatives.

Benefit integration permits a union to obtain the broadest range of benefits for its members, at a cost which requires minimal trade-offs in other areas. By prohibiting such integration, H.R.3200 forecloses a union's ability to obtain needed benefits for small groups of its members, since the cost associated with spreading such benefits over the entire workforce will generally require compromises in other areas exceeding their value to the general membership.

All collective bargaining agreements are the product of careful negotiation between unions and management. A major determining factor in all such agreements is the projected cost of the agreed to terms. By substantially increasing the future cost of existing benefit packages, this legislation will radically alter the bargains arrived at through the negotiation process. Employers, unions and employees will find themselves in a difficult dilemma, faced with nothing but unattractive alternatives. Employers may move to reopen existing agreements, seeking reductions in existing benefits or concessions elsewhere to offset unexpected cost increases, attempt to set the agreements aside altogether as invalid, or absorb the cost for the term of the agreement and demand substantial overall concessions on their expiration.

At a time when American industry, both union and management, is striving for greater cooperation in order to make themselves competitive in a global marketplace, legislative action forcing them into an adversary posture appears counterproductive at best.

The proposal not only puts at risk hundreds of existing bargaining agreements, it jeopardizes organized labor's ability to minimize the impact of force reductions. Traditionally, in times of industrial reorganization, such as this country is experiencing today, labor unions have sought to reduce the impact on their membership, and society's various welfare programs, by negotiating early retirement options and "windows." These programs have historically provided increased benefits for those members of the workforce who voluntarily choose to cease working, somewhat sooner than they might otherwise have done, thus preventing the involuntary termination of others who wish or need to continue working.

Providing incentives to those who are willing to self-select permits individual employees to assess their own personal financial and other desires in deciding whether or not to continue working; thus, permitting a force reduction to be accomplished in the most humane manner possible. By outlawing such "windows," the Bill deprives older workers of the right to choose enhanced benefits and assures that the brunt of any reductions in force will be borne by those workers whose expenses are generally highest and who can, thus, least afford unemployment.

Similarly, by invalidating existing early retirement programs, the Bill would prevent older employees, whose wishes and personal financial situation drive them to do so, from electing to leave the workforce prior to normal retirement age and pursue other interests or simply extend their period of retirement.

The Cost-Test

The proposal's adverse impact on older workers can be clearly seen in the logical results of the application of its cost-justification test. Few employers reduce benefit coverage to active employees. Such reductions normally take place at or after retirement. However, an obvious way of recouping some of the unexpected costs inherent in this legislation would be to take advantage of this provision and commence benefit reductions much earlier.

Such reductions could be substantial and would aversely impact older workers. The cost of providing health care benefits and life insurance, to name but two, increases substantially with age. Incremental reduction in these benefits, tied to the cost of their provision, would seriously erode the benefits available to active older workers.

Of course, this alternative is premised on the assumption that employers would actually be able to cope with the administrative labyrinth of accurately determining the cost of providing each element of their benefit package to each employee age group. By far the simpler, and more economical, means of solving its dilemma would be for the employer to terminate all of its existing benefit plans and to provide each employee with a given number of dollars, permitting them to purchase their own benefits. For virtually all workers, the benefits available under such a system would be substantially less; and the older the worker, the harder hit he or she would be.

Retroactivity

Retroactive application of any statute is to be avoided, in that it deprives citizens of their fundamental right to rely on the law as it existed at the time actions were taken. In a statute which would have the sweeping, revolutionary impact on the vast majority of this nation's existing employee benefit plans found in H.R.3200, such a provision is manifestly unjust.

For decades, employers, labor unions and employees have looked to the "non-discrimination" tests established by the Internal Revenue Service and, for the last 15 years, have relied on the myriad ERISA regulations and judicial decisions delineating their rights and obligations to assure themselves that benefit programs, and their implementation, conformed to applicable law. Particularly given the extensive history of most such programs and the fact that the United States Supreme Court, as early as 1974, in United Airlines v. McMann, determined that any benefit plan which pre-dated ADEA could not constitute a subterfuge, retroactive application of this Bill would be unreasonably egregious.

If Congress is to redefine the way in which employers establish and maintain benefit programs, it should be done only on a prospective basis, providing ample opportunity for the overall redesign of such programs which compliance will require.

CONCLUSION

The proposed legislation is, quite simply, unwarranted. It represents a radical departure from the law which existed prior to the Betts decision, substantially alters 25 years of legal precedent applying anti-discrimination statutes, undermines the validity of guidelines, practices and judicial interpretations of ERISA, places an undue strain on labor/management relations at a time when American industry can least afford it, threatens the soundness of benefit funding assumptions, establishes a cost-justification test with which few, if any, employers can comply and will adversely impact the very persons it is allegedly designed to assist. Even absent the necessity to redesign most existing employee benefit packages, the proposal is ill-conceived.

AISI, and its member companies, are all fully committed to the rights of America's older workers. However, without a clear articulation of the perceived societal problem at issue, it is impossible to craft a legislative response which can resolve that problem, while retaining the positive features of today's fringe benefit packages. To date, the nature and parameters of the asserted problem remain murky at best and do not justify the extensive ramifications to be found in H.R.3200. Until the precise problem has been articulated, no legislative "solution" should be enacted.

EQUAL EMPLOYMENT ADVISORY COUNCIL
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September 20, 1989

The Honorable Matthew G. Martinez
Chairman
House Subcommittee on Employment Opportunities
402 Cannon House Office Building
Washington, D.C. 20510

Re: Hearings on H.R. 3200, Older Workers Benefit Protection Act

Dear Representative Martinez:

A hearing on this legislation is scheduled for tomorrow. We respectfully request that the attached letter be inserted into the hearing record.

Very truly yours,

Douglas S. McDowell

Douglas S. McDowell
General Counsel

Enclosure

cc: Representative Steve Gunderson

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September 20, 1989

Hand Delivered

The Honorable R. Gaull Silberman
Vice Chairman
Equal Employment Opportunity Commission
1801 L Street, N.W.
Room 10109
Washington, D.C. 20507

Re: Betts Legislation: S. 1511, H.R. 3200

Dear Vice Chairman Silberman:

For your information, we have received a number of inquiries about the positions advanced by employers in their responses last year to the EEOC's Advance Notice of Proposed Rulemaking (ANPRM) on benefits and retirement plans under the ADEA. Apparently, some proponents of the current Betts legislation are suggesting that employer comments urging EEOC not to change certain parts of the Interpretative Bulletin (I.B.) somehow translate into implicit endorsement of the I.B. or this legislation. This is not so. Indeed, because of these inquiries, you might find it helpful to have a bit more explanation as to how the Equal Employment Advisory Council's (EEAC's) comments on the Commission's ANPRM on benefit plans and early retirement plans would be affected by pending legislation to reverse the Betts decision.

As discussed below, the legislation conflicts in toto with past positions taken by EEAC. EEAC's briefs predating the ANPRM took issue with various EEOC interpretations of Section 4(f)(2) expressed in EEOC litigation positions and in the I.B., and our position has never changed. In any event, the legislation goes far beyond adopting the I.B., and would change the law in several major respects.

One such major change is that S. 1511 and H.R. 3200 amend Section 4(a)(1) to prohibit age distinctions in all benefit plans or packages. Previously, benefit plans were mentioned only in Section 4(f)(2). Accordingly, under the bills, any age distinctions in retirement and benefit plans arguably would be implicated. The only defense permitted would be individual (not group) cost justification. Thus, the legislation actually would encourage plaintiffs to attack group actuarial data and 5-year age groupings for such data -- practices now allowed by the I.B.

We also understand that the EEOC is concerned that these bills would undercut early retirement incentive programs. We agree with that assessment and would add that the bill also raises serious concerns about the continued use of normal retirement age and normal early retirement age. The reference in Section 4(2)(B) of the legislation to the EEOC's I.B. does not cure the problem. Whatever the I.B. would allow is taken away by language requiring a cost defense (on an individual basis) for any age differentiations. Such an absolute requirement would be contrary to past government positions that the cost defense is not an absolute requirement. See EEOC brief in Cipriano and Solicitor General's position in the Betts Oral Argument (transcript at p. 43).

The result of the legislation would make it unlikely that many well-accepted age differentiations for both normal and early retirement plans could pass the statutory test. Further, the bills would make these changes retroactively, another consequence never addressed in the rulemaking. Thus, the bills go far beyond the issues posed in the EEOC's ANPRM and raise problems never contemplated in comments made in response thereto.

Further, at the time the ANPRM was published, EEOC was under considerable pressure to tighten up on its enforcement of the ADEA. Congressional pressure on EEOC regarding waivers, pension accrual and EEOC conciliation procedures caused concern among the employer community that some of the favorable parts of the I.B. might be in jeopardy. It was clear that nothing favorable to employers would be added by EEOC; and if it were, legislation would be introduced to reverse the changes.

Our concerns were increased by the specific questions posed in the ANPRM that singled out generally-accepted business practices for reconsideration. These included: the "equal cost defense" as a safe harbor, and not an absolute requirement; other safe harbors; group cost data based on 5-year age bands; some differentiation between age groups under the "benefit package" approach; integration of certain government benefits (such as Social Security) into benefit plans; and permissible time limits for the payment of disability payments.

As our comments noted, past EEOC attempts to delete employer protections from the I.B. (such as no pension accrual after normal retirement age) did not have support in the legislative history. We urged that no similar unwarranted changes be made in the I.B. Thus, in urging the Commission not to change the I.B., we were not categorically endorsing the I.B., but rather were attempting to deter any changes in what our members viewed as favorable parts of the I.B.

It is questionable, in any event, whether the ANPRM ever addressed many of the issues raised by the proposed legislation. The ANPRM on employee benefits stated:

> It should be noted that the ANPRM does not request comments regarding either pension benefits or early retirement programs, both of which will be addressed in separate proceedings.

53 Fed. Reg. at 26780, July 15, 1989. The separate ANPRM, however, addressed only early retirement plans, and never mentioned the equal cost defense, the integration of retirement and severance benefits, or the use of actuarial tables with respect to retirement plans. See 53 Fed. Reg. at 26788, July 15, 1989. Thus, the EEOC's ANPRM is not particularly relevant to many of the issues raised by the bills.

Indeed, the EEOC did not ask for specific comments on other parts of the I.B. or EEOC positions where EEAC's opposition was a matter of record. For example, the I.B. (at 29 CFR § 1625.10(f)(2)(ii)) states that the benefit package approach does not apply to a retirement or pension plan. In 1983, EEAC's briefs in EEOC v. Westinghouse and EEOC v. Bordens argued, contrary to the EEOC, that it was permissible for an employer to integrate severance payments for retirees into its retirement program, and that additional severance payments to retirees was not required. Those arguments were restated in our 1989 briefs in Abenante v. Fulflex (regarding pension offsets to severance pay) and in EEAC's brief urging the Supreme Court to review the Westinghouse case.

Further, EEAC's briefs in Westinghouse, Bordens, and Betts argued that benefit plans were not covered by the ADEA except as provided in Section 4(f)(2). This position was adopted ultimately by the Supreme Court. Also, our comments to the ANPRM and our Betts brief urged that the burden of proof never shifts to the employer. That position was roundly criticized by EEOC officials after EEAC's comments were filed, but was adopted by the Court in Betts. The legislation would shift back the burden to the employer to prove the validity of its benefit plans.

Neither the severance/retirement nor Betts issues were included in the questions posed in the ANPRM. And given the EEOC's past positions, it did not seem particularly helpful to raise in our comments positions that already were on record with the EEOC and which the EEOC was sure to reject in any event.

In short, our comments, like others from the employer community, were in response to specific questions from the EEOC, and were submitted out of concern that certain favorable portions of the I.B. were in some danger of being modified. Certainly, had the ANPRM contained the specific language of the pending legislation, we would have pointed out that it was at odds with EEAC's past litigation positions in every respect. Of course, since the legislation goes far beyond the existing I.B. in restricting employee benefit plans, the Commission could in no way be faulted in not posing those additional questions in its ANPRM.

Hopefully, these further comments will clarify EEAC's positions. Please let us know if you have any questions about this letter, our comments in the ANPRM, or any of the briefs filed by EEAC.

Sincerely yours,

Douglas S. McDowell

Douglas S. McDowell
General Counsel

cc:

Representative Steve Gunderson
Senator Orrin Hatch
The Honorable Edward M. Kennedy
The Honorable Matthew G. Martinez
Charles A. Shanor, General Counsel

JUSTICE for AGE DISCRIMINATION in EMPLOYMENT, Inc.
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STATEMENT OF THOMAS J. CONBOY, CHAIRMAN

JUSTICE FOR AGE DISCRIMINATION IN EMPLOYMENT, INC.

ON H.R. 3200

BEFORE THE

SELECT COMMITTEE ON AGING,
COMMITTEE ON EDUCATION AND LABOR
SUBCOMMITTEES ON EMPLOYMENT OPPORTUNITIES AND
LABOR MANAGEMENT RELATIONS,

HOUSE OF REPRESENTATIVES

WASHINGTON, DC   SEPTEMBER 21, 1989

Mr. Chairman and members of the committees. Thank you for the opportunity to submit testimony on the consequences of the Supreme Court decision in Public Employees Retirement System of Ohio v. Betts.

My name is Thomas Conboy. I am Chairman of Justice for Age Discrimination in Employment, Inc. We are a nonprofit victims advocacy organization. Our two main goals are: (1) To bring to the attention of Congress the methodology and ramifications of age discrimination in the workplace and; (2) To provide direct benefits to the members of our organization. I submit this testimony in behalf of the members of Justice for Age Discrimination in Employment, Inc., which we call "JADE" for a short name. JADE has members from 25 states across the nation. The case histories which various members have related to me hinge directly upon the recent astonishing Supreme Court decision in the Betts case. I would like to relate to you why specific legislation must be implemented by Congress in this session in order to counter the devastating effects of the Betts decision. It must be put into law on a retroactive basis. Otherwise, many ADEA cases will be thrown out of the lower courts.

There are, among corporate employers and government employers, those who will take advantage of the Betts decision. Unfortunately, the vast majority of employers will do so with malicious intent to deny older workers, managers and professionals their rightful benefits in the workplace. The pretextual methodology employed by these employers is entitled "cost justification". However, the true intent is to arbitrarily deny older employees their job benefits based strictly on their age. The immediate reaction by most older workers is to seek an employer who will not discriminate regarding benefits. This, of course, raises the problem that in spite of the ADEA laws, the older employee finds that age discrimination is rampant in his or her search for an employer that is age neutral. Then there is the virtually unsolvable problem of the long term employee who would lose too much in the way of benefits by changing employers late in a career. Most tragically, there are the employees like Mrs. Betts who have no other choice but to accept the lesser benefits because of their age and disability.

This methodology of denying benefits to which employees are entitled is short-sighted on the part of the employer because they lose the most productive employee at the zenith of his capability and other experienced workers shy away from that employer because of poor benefits. Worse yet, the employee has given the best years of his working life to that employer and when he needs his hard earned benefits the most, he is denied part or all of it. That is the scenario now which many times ruins the financial independence of the concerned worker. Consider this, the men and women who are now suffering this benefits discrimination are from a low birth rate generation. Thinking this same scenario through to a time fifteen or twenty years down the road when we will have the so-called "baby-boomers" hitting their late fifties and early sixties, the employers of this nation will be putting possibly millions of men and women on the street without adequate benefits protection. Disabilities, such as the terrible thing that happened to Mrs. Betts, will create an entire new wave of homeless people, or worse yet, a geometric increase in the number of disabled people who become wards of state run nursing homes.

I would like to cite the experience that one of our members is going through right now. He lost his job due to age discrimination. He was in senior management but not at the policy making level. Fortunately, for his particular case, he saw memos that in effect said to get rid of older managers in order to reduce costs, which is illegal under the ADEA. He is convinced that an additional factor in his case was that his wife was suffering from cancer and the company foresaw a large expense looming in their health insurance plan. His COBRA plan is about to expire and he cannot get any insurance from private carriers because of his wife's medical condition. The very likely result is that this man could spend his entire estate on the treatment required by his wife. This is one of the most tragic situations that can befall a family when an employee needs his benefits the most and this kind of tragedy is happening to more and more workers, managers and professionals. This is not the same exact situation in which Mrs. Betts finds herself but it goes to the heart of age discrimination with respect to employee benefits. Whether it is a set age at which an employee benefit is withdrawn, as in the Betts case, or an employee being fired just when he most needs a benefit, such as a health plan to pay for a major illness, it is discrimination based entirely on the employee's age.

These are intolerable situations which must be legislated out of existence and H.R. 3200 constitutes a strong step in that direction. It will not stop the rampant illegal age discrimination that takes place in this nation but it will stop the blatant benefits discrimination that has seemingly been blessed with approval by the Supreme Court.

What are the penalties which we will pay if H.R. 3200 is not put into law? The American worker will experience an ever increasing erosion of other protections under the ADEA. If history is any teacher, the majority of employers have been, and intend to continue, weakening the ADEA and water-down the damages which they must pay when found in violation of that body of federal law. All of us are eventually subject to age discrimination in the workplace. If employers are allowed to continue denying benefits based on age then next will come significant erosion of the ADEA with respect to hiring, firing and promotions. An examination of case law already reveals that many employers escape the payment of damages even when found in violation of the ADEA. The only damages allowable under present ADEA law are remedial damages plus liquidated damages. In far too many cases, the defendant employer manipulates a jury into believing that they would have fired the employee anyway and therefore, in spite of the fact that they have actually engaged in unlawful age discrimination, they should not have to pay that employee any money damages. Time and again, juries swallow this pretextual cover-up and find the employer in violation of the ADEA but they become convinced that the employer should not have to pay for his illegal actions. It requires some smooth lawyering, one or more expert witnesses who are nothing more than paid lackeys of the defendant employer and a deep pocket that can afford all of that type of high-priced defense tactics. The end result is that the employer has broken the ADEA laws with impunity.

This is just another example of how erosion of an important set of laws can set in over time. The Betts decision adds to the already weakened ADEA and must be reversed by specific legislation in the form of H.R. 3200. The courts, and the powerful law firms defending employers, will water-down ADEA protections unless Congress passes specific laws and specific allowable damages to secure the rights of older workers.

The JADE organization takes the position that discrimination in employment based on age cannot be allowed even if there are other reasons for the firing or failure to hire or promote an employee. If age is shown to be a consideration the employer is in violation of the ADEA and must pay damages to the concerned employee. Our position is the same on employee benefits as in the Betts case. If age is used as a criteria to reduce benefits that are available to younger workers then that employer must pay the damages suffered by the employee.

The Betts decision reversed a body of law that has protected older employees for more than twenty years. We urge these committees and the entire Congress to implement H.R. 3200 into law this session. We do so with all possible strength of purpose because the crucial benefits to which 40 million workers are entitled depend on the passage of this bill.